No. 84-1379

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,

Appellants

vs.

ALLAN G. CHARLES, M.D., et. al.,

Appellees,

and

THE HOPE CLINIC FOR WOMEN, LTD., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a justiciable case or controversy ceased to exist after state enforcement officials stopped defending the validity of the criminal statute before this Court?

2. Whether §§ 2(10) and 11(d), which impose criminal penalties upon persons who prescribe or administer substances "known to cause fetal death . . . whether or not the fetus is known to exist" are unconstitutionally vague and violative of a woman's right to privacy when making decisions about birth control?

3. Whether § 6(1)'s requirement that physicians performing abortions necessary to preserve the woman's life or health exercise the same standard of care toward the fetus "known to be viable" as the physician would use when delivering a full term infant, is unconstitutionally vague and elevates the life of the fetus over that of the woman?

4. Whether § 6(4), a criminal statute that requires a physician performing an abortion to exercise the same standard of care to preserve the life of a non-viable fetus as the physician would use when delivering a full-term infant, is unconstitutionally vague and deprives a woman of her right to privacy when making and effectuating the abortion decision?

5. Whether the most recent of repeated amendments to the Illinois Abortion Law rendered moot the cross-appeals from the district court's decision declaring § 6(1) constitutional and striking down § 6(4) as unconstitutional?

PARTIES

The intervenors below, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., filed this appeal. Dr. Williams died on April 15, 1985. Neither his estate nor a representative of that estate has asked to be, or has been, substituted in these proceedings. Neither of the state officials charged with enforcing the statute involved filed an appeal or joined the brief submitted by intervenor.

Plaintiffs below, Allan G. Charles, M.D., David Zbaraz, M.D., Marvin Rosner, M.D., Martin Motew, M.D., Arthur Watson, M.D., Robert Steptoe, M.D., and Hector N. Zevallos, M.D., representing a class of physicians who perform abortions as well as women patients seeking abortions, and the Hope Clinic For Women, Ltd. and National Health Care Services of Peoria, Inc., two facilities that provide abortion services, are appellees in this litigation.*

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* Hope Clinic For Women, Ltd., is affiliated with The Hope Medical Group of Shreveport, Louisiana.

OPINIONS BELOW

(See Brief of Intervenors)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on November 28, 1984. Intervenors' Notice of Appeal and Jurisdictional Statement were filed on February 28, 1985. Probable jurisdiction was noted on May 20, 1985. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. Section 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, article III, § 2.
   United States Constitution, amendment I.
   United States Constitution, amendment XIV, § 1.
2. Ill. Rev. Stat. ch. 38, ¶¶ 81-1 *et seq.*

STATEMENT OF THE CASE

A. History Of The Legislation

In the twelve years since this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) ("*Roe*"), the Illinois General Assembly has displayed unyielding hostility to a woman's right of privacy. From the starting premise that human life begins at conception, Ill. Rev. Stat. ch. 38, ¶ 81-21, the General Assembly enacted the Illinois Abortion Law of 1975 ("Abortion Law"). Most operative provisions of the 1975 Illinois anti-abortion law were struck down. *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978) (three judge court) (11 provisions declared unconstitutional), *aff'd, Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979).

The Illinois General Assembly responded to this ruling by enacting essentially the same law in various amended forms, each of which in turn has been struck down by each federal district court and each panel of the Seventh Circuit that has considered them. Each version of this law has reflected the State's unconstitutional theory of when life begins. *Charles v. Carey*, No. 79 C 4541 (unpublished op. of Flaum, J.) (preliminary injunction on 1979 amendments); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980) (preliminary injunction on 1979 amendments); *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983) (permanent injunction on 1979 and 1983 amendments); *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984) (1979 and 1983 amendments); *Keith v. Daley*, No. 84 C 5602 (temporary restraining order on 1984 amendments). *See also Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978) (parental consent law preliminarily enjoined), *aff'd, Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1979) (preliminary injunction) and *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) (permanent injunction); *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984) (operative provision of Parental Notice of Abortion Law of 1983 enjoined), *aff'd in part, vacated in part*, 763 F.2d 1532 (7th Cir. 1985).

The four statutory provisions at issue here are the only sections of the 1979 amendments to the Abortion Law that remain contested. These 1979 revisions originated in Senate Bill 47 ("SB 47"), which also retained the unconstitutional purpose of the 1975 law that declared:

> the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

Ill. Rev. Stat. ch. 38, ¶ 81-21 (§ 1).

SB 47 articulated legislative defiance of the United States Constitution and effectuated that policy through its substantive provisions, including: § 2(8) ("human being" meant the individual from fertilization until death); § 2(9) ("fetus" and "unborn child" each meant a human being from fertilization until birth); § 3.5(2) (required physicians to provide each patient seeking an abortion with the statement that, "[t]he State of Illinois wants you to know that in its view the child you are carrying is a living human being"); and § 6(2) (made the Illinois homicide law applicable to abortion procedures). SB 47 contained 19 new criminal offenses relating to abortion, restricting every aspect of the decision and its effectuation. In most cases, violation of any of the restrictions was punishable as a Class 2 felony which carried as a penalty "not less than three

or more than seven years imprisonment." Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(5) (1983).

Neither this Court's recent decision in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) ("*Akron*"), reaffirming *Roe*, nor the decisions by the federal courts in the Seventh Circuit has deterred the Illinois General Assembly from enacting legislation sharply curtailing a woman's right of privacy. On June 30, 1984, the General Assembly enacted House Bill 1399 ("HB 1399"), which further amended the Abortion Law.[1] HB 1399 maintains the unconstitutional policies established by its predecessors. Section 1, declaring that human life begins at conception, is retained in its entirety. Many changes consist of merely renumbering prior sections which had been declared unconstitutional, including §§ 2(10) and 11(d).[2] Other nonsubstantive changes involve substituting the term "individual organism of the species homo sapiens" for the term "human being" in sections which had been declared unconstitutional for adopting the State's view that life begins at fertilization.[3] A group of obstetricians and gynecologists challenged the constitutionality of HB 1399 and, on July 1, 1984, secured a temporary restraining order against its enforcement. *Keith v. Daley*, No. 84 C 5602 (N.D. Ill. 1984). That restraining order remains in effect.

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[1] A copy of HB 1399 is found in Plaintiffs' Supplemental Appendix ("S.A.") at 12. Unlike other jurisdictions which, in response to the *Akron* decision, stopped enacting anti-abortion legislation, Brief Amici Curiae of ACLU and others, in *Thornburgh v. ACOG*, No. 84-495, at 28 & n.60, Illinois has continued its defiance of the *Roe* decision.

[2] In HB 1399, §§ 2(7) and 11(3) are verbatim replicas of §§ 2(10) and 11(d), which are challenged herein. Likewise, §§ 5(2), 11(3), 10(1), (3), (4), (5), (6), (9), and (11) of HB 1399 are renumbered versions of sections held unconstitutional in the *Charles v. Carey* litigation and not appealed.

[3] Amended § 2(6) and § 6(3), now articulate the State's view that the life of "an individual organism of the species homo sapiens" begins at fertilization. Their predecessors, previously enjoined, articulated the State's view that the life of a "human being" began at fertilization.

B. History Of The Litigation

Plaintiffs, who perform abortions and who also provide family planning services to their patients, challenged the constitutionality of SB 47 under 42 U.S.C. § 1983 on behalf of a class of all physicians performing abortions in Illinois and on behalf of their patients desiring abortions.[4] Had SB 47 gone into effect, physicians would have stopped performing pregnancy terminations for fear of criminal prosecution. (Charles affidavit, Joint Appendix ("J.A.") at 7-8; Keith affidavit, J.A. at 12-13; Zbaraz affidavit, J.A. at 24; Motew affidavit, J.A. at 52.) Named as defendants were those Illinois officials charged with implementing and enforcing SB 47: the Illinois Attorney General, the Director of the Illinois Department of Public Health and the State's Attorney of Cook County, who was sued in his official capacity and as the representative of the defendant class of all Illinois State's Attorneys.[5] Plaintiffs' motion for a temporary restraining order against the entire statute was granted on October 31, 1979.

Over plaintiffs' objection, the district court granted the motion of Eugene Diamond, M.D., Jasper F. Williams, M.D., and David Campbell to intervene as defendants on November 13, 1979. The order allowing intervention did not specify whether it was permissive or of right. The district court did not grant intervenors' request that they be appointed guardians ad litem for unborn fetuses.

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[4] *Hope Clinic for Women, Ltd. v. Scott*, No. 79 C 4548, a related case filed by three other physicians and two clinics which provide abortion services, was consolidated with this action.

[5] Pursuant to Illinois law, the Attorney General has represented the Director of the Department of Health throughout this litigation.

Diamond, a pediatrician who objects to abortion on moral grounds, moved to intervene as the parent of a minor daughter of child-bearing age and as a physician who claimed fiscal and professional interests in reducing the number of abortions. (Intervening Defendants' Motion to Intervene and Petition for Appointment of Guardian Ad Litem, S.A. at 4-6 (hereinafter "Motion to Intervene").) Diamond did not allege any personal or professional interests involving §§ 6(1), 6(4), or 2(10) in support of intervention; his purported interest in § 11(d) (motion to Intervene, S.A. at 4.) depended upon the parental notice provision, § 3.3, which was declared unconstitutional and thus no longer is at issue.

Williams, an obstetrician and gynecologist, also objected to abortion on moral grounds. He moved to intervene to defend the "rights and interests of his prenatal patients," and to protect his fiscal interest in receiving more patients should the number of abortions be reduced. (Motion to Intervene, S.A. at 8.) Williams claimed no personal interests in §§ 2(10) or 11(d); his alleged interest in § 6 was derivative of his desire to "defend the rights and interests" of unborn fetuses. David Campbell, no longer a party to this litigation, sought intervention as the spouse of a woman of child-bearing age. (Motion to Intervene, S.A. at 9.)

On November 16, 1979, the district court granted, in part, plaintiffs' motion for a preliminary injunction against numerous statutory provisions, including two of these at issue here, §§ 6(1) and 6(4). Plaintiffs and all defendants appealed the district court's ruling.[6]

The United States Court of Appeals for the Seventh Circuit affirmed the district court's injunction. *Charles v. Carey*, 627

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[6] The district court's opinion is found at page 1a of Plaintiffs' Motion to Dismiss or Affirm. The district court also enjoined the following sections: 2(2), 4, 5(1)-(3), 3.3, 3.4, that portion of 3.5(2) which required giving a pregnant woman printed information stating that abortion is the destruction of a human being, 9, 10(i), (j) and (l) and the third sentence of § 12.

F.2d 772 (7th Cir. 1980) ("*Charles I*"). Moreover, the court of appeals directed that several additional sections be preliminarily enjoined, including the remaining two sections at issue here, §§ 2(10) and 11(d).[7]

On remand, the district court enjoined §§ 2(10) and 11(d), as well as numerous other provisions. (Order of Aug. 7, 1980.) Plaintiffs renewed their motion for preliminary injunction as to several other provisions and moved for summary judgment asking that all of SB 47 be declared unconstitutional. The district court deferred its ruling on the motions until after the decision in *Akron*, 462 U.S. 416 (1983). The district court then reconsidered plaintiffs' motions, asked for supplemental briefs, and preliminarily enjoined many additional provisions of SB 47. *Charles v. Carey*, 579 F. Supp. 377, 384 (N.D. Ill. 1983) ("*Charles II*"). Subsequently §§ 2(10), 11(d), and 6(4), as well as 22 other sections of SB 47, were permanently enjoined. *Charles v. Carey*, 579 F. Supp. 464, 476 (N.D. Ill. 1983) ("*Charles III*").[8] The district court, however, declined

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[7] The court of appeals directed that the following sections also be enjoined: 6(6), 3.5(2), 3.2(A)(1)(a)(iii), 3.2(B)(1), 10(k), 6.2, portions of 3.2(A)(1)(a) and 3.2(A)(1)(b). *Charles I*, 627 F.2d at 792 n.36.

[8] During the three-month interval separating the decisions in *Charles II* and *Charles III*, the General Assembly enacted House Bill 666 ("HB 666"), amending § 2(2) to define viability as a "reasonable likelihood of sustained survival" rather than the previous, unconstitutional "more than momentary survival." Section 6(4) also was amended to apply when there is a possibility of sustained survival of the fetus. Although the district court found amended § 2(2) constitutional, it refused to lift the injunction on § 6(4), which penalized physicians who performed abortions prior to viability when there was but a "*possibility*" of "sustained survival" outside the womb. *Charles III*, 579 F. Supp. at 466, 475-77. (Emphasis added.)

to enter a permanent injunction against § 6(1). It found that the injunction of § 6(4) eliminated any unconstitutional confusion or inconsistencies between the two sections. 579 F. Supp. at 471-72.

Intervenors appealed, as did Attorney General Hartigan and State's Attorney Daley. Defendants, led by intervenors, chose to appeal only the district court's decision on §§ 2(10), 11(d) and 6(4). (J.A. at 131.) Intervenors did not appeal the injunction of the other 22 provisions. Plaintiffs cross-appealed, challenging the district court ruling that § 6(1) was constitutional. The State's interest in SB 47 waned after the decision in *Akron*. Neither Hartigan nor Daley filed a brief urging the court of appeals to uphold §§ 2(10), 11(d), 6(1) and 6(4), but merely adopted intervenors' briefs. (J.A. at 135, 137.) Likewise, neither chose to present oral argument before the court of appeals.

Prior to oral argument, intervenors advised the court of appeals that HB 1399 had been enacted. Despite the clear terms of Circuit Rule 11, intervenors did not inform the court that they considered the appeal moot on §§ 6(1) and 6(4). Instead, intervenors articulated this contention for the first time at oral argument. Intervenors, however, did not dismiss their appeal or withdraw their argument that §§ 6(1) and 6(4) were constitutional. In its decision, the court of appeals held that HB 1399 did not moot the appeal. *Charles v. Daley*, 749 F.2d 452, 456-57 (7th Cir. 1984) ("*Charles IV*"). The court of appeals also held that all four sections on appeal — §§ 2(10), 11(d), 6(1) and 6(4) — were unconstitutional.

Intervenors filed their notice of appeal to this Court and jurisdictional statement ("Juris. St.") on February 28, 1985. Contrary to intervenors' representations (Juris. St. 2), neither the Attorney General nor the State's Attorney filed a notice of appeal or joined in intervenors' jurisdictional statement.[9]

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[9] Intervenor Williams died on April 15, 1985. Thus, Diamond is the sole appellant now involved. Hereafter, he will be referred to as "intervenor," or "Diamond."

SUMMARY OF THE ARGUMENT

Intervenor's solitary defense of the Illinois criminal abortion statute, even after state officials apparently concede its unconstitutionality, does not present a justiciable "case or controversy." The lack of an Article III case or controversy between the real parties in interest here — plaintiff-physicians who risk prosecution under the challenged statute and the state defendants charged with enforcing the statute — requires dismissal for lack of jurisdiction. *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam).

Sections 2(10) and 11(d), which require that certain undefined drugs and devices be labeled as "abortifacients," must be analyzed in accordance with the expressed statutory purpose: that human life begins at the moment the ovum is penetrated by the sperm. These forced speech requirements are designed to advance the State's view of human life and to discourage women from using certain birth control devices, and thus infringe upon a woman's right of privacy and violate plaintiffs' First Amendment rights. Sections 2(10) and 11(d) also have a broad reaching but undefined scope and thus are unconstitutionally vague.

Section 6(1) establishes a physician's obligation to a viable fetus. This section does not, however, clearly leave the viability determination to the attending physician. Therefore, § 6(1) is unconstitutionally vague. *Colautti v. Franklin*, 439 U.S. 379 (1979) ("*Colautti*"); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) ("*Danforth*"). It is uncertain whether § 6(1) allows a physician, when selecting an abortion technique and when performing the actual termination, to consider his duty to preserve the woman's life and health paramount to his duty to preserve the fetus. Thus, § 6(1) further contravenes express holdings of this Court that regulations of post-viability abortions may not limit a woman's right to receive her physician's best medical advice nor deny the physician the necessary discretion to effectuate the abortion decision. *Akron*, 462 U.S. at 416; *Colautti*, 439 U.S. at 379.

Section 6(4), which imposes the same standard of care as does § 6(1), shares § 6(1)'s unconstitutional vagueness and

impermissibly infringes upon a woman's right to exercise the abortion decision consonant with her best interests. Further, § 6(4) strictly regulates abortion prior to viability and imposes upon the physician a duty of care toward a fetus that is not capable of sustained and meaningful existence outside the womb. Once again, unequivocal holdings of this Court delineating the limits of permissible abortion regulation have been disregarded. *Colautti*, 439 U.S. 379; *Danforth*, 428 U.S. 52.

The constitutionality of the H.B. 1399 amendments to §§6(1) and 6(4) is not properly before this Court. Amended §§ 6(1) and 6(4) are presently under review in the United States District Court of the Northern District of Illinois in *Keith v. Daley*, No. 84 C 5602. Intervenor is not a party to that case. Intervenor's assertion that amended §§ 6(1) and 6(4) present only legal questions is incorrect and contrary to his representations in the court of appeals, which declined to review these provisions as amended. Moreover, this Court has declined to review superseding statutes as an original matter; there is no reason to depart from this well established principle.

Finally, the amendments to §§ 6(1) and 6(4) did not moot the issue of their constitutionality. Illinois' most recent of repeated amendments to §§ 6(1) and 6(4), while on appeal, is nothing more than a voluntary cessation of a challenged practice which did not moot the case before the court of appeals. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982).

ARGUMENT

I. INTERVENOR, WHO ASSERTS MERELY HIS GENERALIZED GRIEVANCES AGAINST ABORTION, FAILS TO PRESENT A JUSTICIABLE "CASE OR CONTROVERSY" TO THIS COURT.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (*"Valley Forge"*). No Article III "case or controversy" is presented in this appeal: intervenor is not the proper party to request adjudication of the constitutionality of a statute the State itself has chosen not to defend. Nor does intervenor's personal moral opposition to abortion constitute the Article III "case or controversy" that this Court has demanded of every party seeking to invoke its jurisdiction.

Plaintiffs named as defendants state officials who have the statutory duty both to prosecute plaintiffs under the challenged law and to defend its constitutionality. The duty for initiating criminal prosecutions clearly lies with the State's Attorneys in the 102 Illinois counties. Ill. Rev. Stat. ch. 14, ¶ 5 (1983). Illinois law vests only the Attorney General with authority to defend the constitutionality of a state statute challenged in federal court. Ill. Rev. Stat. ch. 14, ¶ 4 (1983).

Plaintiffs initiated this lawsuit under 42 U.S.C. § 1983, which requires allegations of state action on the part of the defendant. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). Plaintiffs could not have named intervenor as a defendant to this suit because, as a private party, he lacks authority either to defend this state criminal statute or to initiate any prosecutions under it.[10] Intervenor concedes as much. In his brief contesting

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[10] Intervenor's attempt to continue his private defense of this § 1983 lawsuit, without the state actors, undermines this Court's careful shaping of the state action doctrine to reflect the fundamental distinctions between state and private conduct. *See, e.g., Blum v.*

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the assessment of attorney's fees, he admitted his lack of legal interest in this case:

> [I]ntervenors did not and could not have violated plaintiffs' constitutional rights in any manner. They did not enact the law and cannot administer or enforce the state law which was held to violate plaintiffs' constitutional rights.

(Brief in Opposition to Plaintiffs' Petition for Attorney's Fees Against Intervenor-Defendants at 7, filed Dec. 28, 1984).[11]

Neither the Attorney General nor the State's Attorney appealed the Seventh Circuit's decision enjoining this criminal statute. Pursuant to Supreme Court Rule 10.4, "[a]ll parties to the proceedings in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, . ." even if they did not file a notice of appeal. The state defendants have not joined intervenor after this Court noted probable jurisdiction, nor have they filed a brief or adopted intervenor's brief, as each had done before the court of appeals.[12] Thus, the case or

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Yaretsky, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

[11] In a further attempt to avoid liability for attorney's fees, intervenor himself has admitted that he is not the appropriate party to continue this litigation. In a motion submitted to the district court, counsel for intervenor asked that an organization, Americans United For Life ("AUL"), be substituted in place of Diamond as the sole intervening defendant. In that motion, counsel stated that Diamond had been solicited by AUL to participate in this litigation and that AUL, not Diamond, was the party interested in this litigation. Intervenor requested that AUL be substituted in his place "for all purposes, including the assessment of attorney's fees." (Motion to Amend Judgment at 3-4, filed May 2, 1985).

[12] Mr. Hartigan filed a letter with the Clerk of the Supreme Court, dated July 15, 1985, stating only that "[t]he Illinois Attorney General's interest in this proceeding is identical to that advanced by it

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controversy between plaintiffs and the only defendants who could enforce the challenged statute is concluded. An intervenor with no enforcement authority cannot resurrect this expired litigation.

This Court's decision in *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam) ("*Schmid*"), precludes intervenor's independent attempt to create Article III jurisdiction. In *Schmid*, the State of New Jersey charged and convicted Schmid of criminal trespass for distributing leaflets on the Princeton University campus. While Schmid's appeal was pending, the New Jersey Supreme Court invited Princeton to intervene. Schmid's conviction was reversed and Princeton appealed to this Court. The State did not file a separate jurisdictional statement but joined in Princeton's. In its brief, the State declined to take a position on the merits.

This Court dismissed Princeton's appeal, holding that no case or controversy existed between the real parties in interest — the state enforcement agency and the party challenging the constitutionality of the governmental enforcement policy. Intervenor Princeton thus had no independent authority to continue the appeal. 455 U.S. at 102.[13] *See also City of Chicago v. Chicago Rapid Transit Co.*, 284 U.S. 577, 578 (1931). Similarly, intervenor Diamond has no authority to continue his private "defense" of a state criminal statute.[14]

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in the lower courts and is essentially coterminous with the position on the issues set forth by the appellants." If this letter were intended to convey Mr. Hartigan's position on the merits of continuing this litigation, it certainly does not satisfy Rule 34(1) of this Court which directs that a party's "brief" clearly set forth his argument, including the points of fact and law being presented.

[13] This Court also held that Princeton's defense of its leafletting regulation was moot because Princeton had amended this regulation. 455 U.S. at 103. Unlike this case, see *infra* pp. 46-49, there was no suggestion that Princeton's new regulation did not eradicate the constitutional problem or that any violation was likely to recur.

[14] That the district court found intervention appropriate does not establish that intervenor had Article III standing. A proposed

(Footnote continued on following page.)

Intervenor claimed no justiciable interest in any of the four provisions before this Court when he sought to intervene below. That intervenor's moral opposition to abortion conceivably might be vindicated by the State's enforcement of these criminal sanctions against physicians who perform abortions does not evince a live case or controversy. This Court has held repeatedly that a private interest that is nothing more than an abstract injury — a generalized grievance — is not justiciable. *See, e.g., Allen v. Wright,* 104 S. Ct. 3315, 3326-27 (1984); *Valley Forge,* 454 U.S. at 482-83; *Linda R.S. v. Robert D.,* 410 U.S. 614, 619 (1973).[15] This generalized grievance, no matter how strongly felt or vigorously advocated, does not provide the requisite "case of controversy" demanded by Article III.

II. SECTIONS 2(10) AND 11(d) IMPERMISSIBLY INFRINGE UPON A WOMAN'S RIGHT OF PRIVACY AND ARE UNCONSTITUTIONALLY VAGUE.

Sections 2(10) and 11(d), in conjunction, require all persons who sell, prescribe, or administer any substance or device that is "known to cause fetal death" to describe it as an abortifacient, "whether or not the fetus is known to exist when such substance or device is employed." Failure to comply is a criminal offense.[16]

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intervenor need not demonstrate standing before he will be allowed to participate in an ongoing lawsuit *United States v. Board of School Commissioners,* 466 F.2d 573 (7th Cir. 1972). This Court may always question the standing of a litigant, *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975), and indeed has the obligation to do so whenever its Article III jurisdiction is in question.

[15] In these cases, plaintiffs, rather than a defendant, sought to have the government enforce a particular law in conformity with their personal views. Intervenor is asserting the same non-justiciable interest asserted by plaintiffs in *Allen, Valley Forge,* and *Linda R.S.* If anything, intervenor's interest is even more attenuated: he must first defend the constitutionality of the challenged sections before he can advocate their enforcement.

[16] Section 2(10) provides in full:

"Abortifacient" means any instrument, medicine, drug, or any

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Neither the State nor the intervenor has ever offered a comprehensive construction of this criminal statute.[17] The uncertainty of the meaning and scope of these requirements not only makes the statute void for vagueness, *infra* at 25-27, but also creates a burden on privacy rights by deterring doctors and others from providing necessary birth control services. It is clear from examining §§ 2(10) and 11(d) in the context of the Abortion Law that the General Assembly intended these particular requirements to advance its view that human life

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> other substance or device which is known to cause *fetal death* when employed in the usual and customary use for which it is manufactured, *whether or not the fetus is known to exist when such substance or device is employed.* (Emphasis added.)

Section 11(d) provides in full:

> Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

A Class B misdemeanor is punishable by imprisonment of up to six months, Ill. Rev. Stat. ch. 38, ¶ 1005-8-3(a)(2) (1983), and fines of $500, Ill. Rev. Stat. ch. 38, ¶ 1005-9-1(a)(3) (1983). A Class C misdemeanor can result in imprisonment of 30 days, Ill. Rev. Stat. ch. 38, ¶ 1005-8-3(a)(3) (1983), and fines of $500, Ill. Rev. Stat. ch. 38, ¶ 1005-9-1(a)(3) (1983).

[17] The only interpretation given this statute was set forth by plaintiffs who feared they would be prosecuted for prescribing certain birth control substances unless they described those substances as abortifacients. (*See* Charles affidavit, J.A. at 4; Zbaraz affidavit, J.A. at 22; Motew affidavit, J.A. at 55.)

begins at fertilization, and interference with a fertilized ovum, therefore, is the killing of a human being.[18]

Sections 2(10) and 11(d) require health professionals to tell all women who receive certain drugs or devices, regardless of whether the woman is pregnant or whether the drugs are for birth control or other reasons, that the substance is an "abortifacient" which causes "fetal death." By communicating its view that certain birth control measures destroy human life, the State thus seeks both to limit the use of these contraceptives and to propagandize its theory of when life begins. This imposition of one theory of life not only places an unconstitutional burden on reproductive privacy rights governed by *Carey v. Population Services International*, 431 U.S. 678 (1978) ("Carey"), and *Roe*, 410 U.S. 113 (1973), but also deeply offends the First Amendment. The principles of that Amendment prohibit the State from forcing private parties to be agents for the State's dissemination of certain ideological, religious or political views. *Wooley v. Maynard*, 430 U.S. 705 (1977).

A. Sections 2(10) And 11(d) Burden A Woman's Right Of Privacy When Making A Decision Pertaining To Birth Control.

1. These provisions require transmission of information that is contrary to accepted medical practice.

Plaintiffs challenged §§ 2(10) and 11(d) because they impair the right of women patients to receive their physicians'

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[18] As set forth in the Statement of the Case, *supra*, § 1 of the Abortion Law reaffirms the long-standing policy of the State of Illinois that "the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life. . . ." The Abortion Law as amended by SB 47 equates conception with fertilization of the ovum with the sperm, Ill. Rev. Stat. ch. 38, ¶ 81-22(7), and defines the fetus as existing from fertilization until birth. Ill. Rev. Stat. ch. 38, ¶ 81-22(9). *See also* § 3.5.(2), Ill. Rev. Stat. ch. 38, ¶ 81-23.5.(2).

best medical advice and require transmission of information that was "medically unjustified" and "scientifically questionable." (Charles affidavit, J.A. at 4; Motew affidavit, J.A. at 50.) At the very least, §§ 2(10) and 11(d) regulate several methods of birth control that interfere with the fertilized ovum, including the intrauterine device (IUD), and diethylstilbestrol ("DES" or "stilbestrol"), a drug given rape victims to prevent pregnancy. (Charles affidavit, J.A. at 4; Zbaraz affidavit, J.A. at 22; Motew affidavit, J.A. at 50). To comply with this law, physicians must describe the IUD and stilbestrol as "abortifacients."

Describing the IUD and stilbestrol as abortifacients, albeit under threat of criminal prosecution, is to accept intervenor's personal distinction between "abortifacient methods of birth control" and "contraceptive methods of birth control." His distinction equates conception with fertilization, a conclusion controverted by most of the medical profession.

According to standard medical authorities, conception is not synonymous with fertilization of the ovum. Rather, conception — pregnancy — occurs six to seven days later, when the fertilized egg, now called a blastula or blastocyst, becomes implanted in the uterine wall. J. Pritchard & P. MacDonald, Williams, Obstetrics at 89 (17th ed. 1985).[19] Conception does not occur each time an ovum is fertilized; only fifty percent of fertilized ova ultimately become implanted. *Post-Coital Con-*

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[19] *See also* Dorland's Illustrated Medical Dictionary at 296 (26th ed. 1985); Obstetric-Gynecologic Terminology, Section 6: Physiology of Reproduction at 299 (Hughes ed. 1972); Milby, *The New Biology and the Questions of Personhood: Implications for Abortion*, 9 Amer. J. Law & Med. 31, 35 (1983). In the past, the distinction between "fertilization" and "conception" was not so carefully delineated. New research in reproductive endocrinology, however, isolated two distinct phases of fertilization and, then, implantation or conception. *See generally* J. Pritchard & P. MacDonald, Williams, Obstetrics, 79-96 (17th ed. 1985). Section 2(7) of SB 47, which provides that "fertilization" and "conception" each means "the fertilization of a human ovum by the human sperm . . . ," makes it clear that the State of Illinois does not distinguish between fertilization and implantation.

traception, The Lancet, 1983, i:856 By adopting a theory of conception — and contraception — contrary to accepted medical practices,[20] and enforcing that theory by the threat of criminal prosecution, §§ 2(10) and 11(d) offend the constitutional limitations on state regulation recognized in *Roe* and reaffirmed in *Akron*. *Akron*, 462 U.S. at 434.

Even accepting intervenor's inaccurate definition of conception, contraceptives regulated by these sections do not always work by preventing implantation. Non-medicated IUDs most often prevent the blastocyst from implanting.[21] IUDs, however, also: impair sperm motility; inhibit ovulation; and act as a spermicide.[22] Likewise, stilbestrol prevents pregnancy by: making the endometrium inhospitable to implantation if fertilization has occurred; inducing early onset of menstruation; and inhibiting ovulation.[23]

Physicians must tell all IUD and stilbestrol patients that these devices are abortifacients, "whether or not the fetus is known to exist when such substance or device is employed," and regardless of whether the device will stop implantation. To require physicians to inaccurately describe IUDs, stilbestrol and other contraceptives to women who are not pregnant burdens women's health interests by interfering with the judgment and

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[20] Interestingly, intervenor, a physician, bases his theory of conception and contraception on Webster's Unabridged Dictionary rather than accepted medical texts. (Int. Br. 13, 22.)

[21] Mishell, *Intrauterine Devices*, 11 Clinics In Obstet. & Gynecol., No. 3 at 679-80 (1984).

[22] *See, e.g.*, Lippes, *Non-medicated IUDS: History, Mechanism of Action, and Clinical Effectiveness*, 6 Gynec. & Obstet. at 1, 4-5 (1985 rev. ed.); Mishell, *Intrauterine Devices*, 11 Clinics In Obstet. & Gynecol., No. 3 at 679 (1984).

[23] Johnson, *Contraception—The Morning After*, 16 Fam. Plan. Pers. 266, 267 (1984). Post- coital contraceptives are not advocated as a substitute for conventional methods of contraception. *Id.* Rather, they are used as an emergency measure in the cases of rape and contraception failure, an option that, in the words of one researcher quoted by intervenor "is surely preferable to abortion." *Id.* at 267.

advice of their physicians. Thus, §§ 2(10) and 11(d) contravenes *Akron's* express holding that if "a substantial portion of the . . . State's regulation 'depart[s] from accepted medical practice,' . . . it may not be upheld . . ." *Akron*, 462 U.S. at 434.[24]

2. **These statutory provisions are designed to influence a woman against choosing birth control that is contrary to the State's theory of life and undermine, rather than promote, informed consent.**

Intervenor's contention that § 2(10) and § 11(d) are merely informed consent provisions that provide women with "accurate information" needed for making a decision about birth control (Int. Br. 12-16) does not withstand scrutiny. First, the information a woman needs to make her choice is already available. Second, §§ 2(10) and 11(d) do not require physicians to give "accurate information" about the many health risks associated with at least two of the substances governed by these provisions, the IUD and stilbestrol.

Women have information explaining the pregnancy-preventing properties of the various substances at issue here. Under Illinois common law, physicians have an affirmative duty to apprise patients of facts concerning their health. *Goldberg v.*

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[24] Intervenor suggests the court of appeals struck down §§ 2(10) and 11(d) on the basis of an "untrammelled right" by physicians to exercise their profession. (Int. Br. 19.) This not only distorts the holding of the court of appeals but also disregards this Court's most recent decision in this area. As reaffirmed in *Akron*, a woman cannot effectuate certain decisions, such as terminating a pregnancy or using prescriptive contraceptives, without the assistance of the physician. Therefore, the State may not interfere with the physician-patient consultation, particularly during the first trimester of pregnancy, *Akron*, 462 U.S. at 434, 445, or, as here, before pregnancy even begins. Relying upon *Akron*, the court of appeals struck down §§ 2(10) and 11(d) because requiring physicians to communicate the prescribed information, regardless of the woman's medical prognosis constituted an unacceptable intrusion upon the physician-patient relationship. *Charles IV*, 749 F.2d at 462.

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Ruskin, 128 Ill. App. 3d 1029, 1039-40 (1st Dist. 1984). Federal requirements are even more specific: women for whom IUDs are prescribed must receive a patient brochure, prior to insertion, which fully explains the IUD, its pregnancy-preventing properties, and its health risks.[25] This brochure describes the IUD as a contraceptive (not an abortifacient) that prevents implantation of the fertilized egg. 21 C.F.R. § 310.502 at 52 (1985).

Federal law also governs the use of stilbestrol. Federal regulations describe this substance as a contraceptive (not an abortifacient) and provide the woman with information about the drug and any side effects related to its use. 21 C.F.R. § 310.501 at 44-45 (1985). In particular, the patient information states that "this drug [stilbestrol] will not cause an abortion if you are already pregnant." 21 C.F.R. § 310.501 at 44 (1985). The patient thus is faced with a federal description of this drug directly contrary to that which §§ 2(10) and 11(d) require her physician to communicate.

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Intervenor mistakenly relies upon *Whalen v. Roe*, 429 U.S. 599 (1977), as justification for these broad regulations of physicians. *Whalen* involved recording prescription narcotic drugs, not the regulation of a fundamental right, such as that involved here. To sustain these sections based on *Whalen* would ignore the potential impact of placing "obstacles in the path of the doctor upon whom [the woman] is entitled to rely for advice in connection with her decision." *Akron*, 462 U.S. at 416, *citing Whalen*.

[25] This brochure explains: (1) the effectiveness of the IUD; (2) previous medical problems that might make the IUD unsuitable as a method of contraception for the particular woman; (3) adverse reactions and side effects that might be caused by the IUD; (4) directions for use; and (5) warnings concerning particular situations such as bleeding and exposure to venereal disease. 21 C.F.R. § 310.502 at 52-54 (1985). Each patient is given this brochure prior to use, provided the opportunity to read it and "discuss fully any questions she may have concerning the IUD as well as other methods of contraception." 21 C.F.R. § 310.502 at 51 (1985).

Akron established unequivocally that only a legitimate health interest justifies state regulation of abortion and that that health interest becomes compelling enough to justify regulation only after the onset of the second trimester of pregnancy. *Akron*, 462 U.S. at 428-29. The thoroughness of the federal regulations,[26] compared with the absence of any health-related information in §§ 2(10) and 11(d), conclusively rebuts intervenor's argument that the challenged sections merely require "the giving of [health-related] information to the patient as to just what would be done and its consequences." *Danforth*, 428 U.S. at 67 n.8.

The only interest §§ 2(10) and 11(d) advance is the State's concern for the potential fertilized egg, defined by § 2(9) as the fetus. This "interest" is not compelling prior to viability, *Akron*, 462 U.S. at 428, and therefore does not justify regulation here, prior to pregnancy. Illinois women, nonetheless, are burdened with listening to the State's view of conception and life before they may exercise their fundamental right to use birth control.[27] If the State cannot justify its

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[26] The Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.* (amended 1984), under which the IUD and stilbestrol regulations were promulgated, preempts this attempt by the State of Illinois to further regulate these contraceptives. The Medical Device Amendments of the FDCA, 21 U.S.C. §§ 360a-k, is an unequivocal declaration by Congress that it occupies and preempts the field of regulating contraceptive devices. These amendments preempt any state regulation which "relates to" and is "different from the federal law." 2 U.S.C. § 360k(a). Obviously, the Illinois law, which would define the IUD, for example, as an abortificient is different from the federal law. Thus, §§ 2(10) and 11(d) are preempted by the FDCA. For a complete discussion of the preemptive effect of the FDCA, see Brief of Amici Curiae, Planned Parenthood, *et al.*, in *Diamond v. Charles*, No. 84-1379, at 19-22. *See also* 21 C.F.R. § 808.01; *National Women's Health Network v. A.H. Robins Co., Inc.*, 545 F. Supp. 1177 (D. Mass. 1982).

[27] Intervenor's citation of *Danforth*, 428 U.S. 52 (1976), and *Akron*, 462 U.S. 416 (1983), thus is inapposite. These cases leave undisputed that an informed consent provision is valid *only* if it

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regulation of abortion by defining life, *Roe*, 410 U.S. at 159-62,[28] it certainly may not justify regulation of contraception or birth control by adopting a certain theory of life. *Charles IV*, 749 F.2d at 462.

B. The Forced Speech Aspects Of Sections 2(10) And 11(d) Run Afoul Of The First Amendment.

Under § 11(d)'s threat of criminal prosecution, a physician is forced to make certain pronouncements about the nature of certain birth control substances and the beginning of human life, with which he may profoundly disagree. This unquestionably forces the physician to "act as the mouthpiece of the State," a violation of his or her First Amendment rights. *Charles IV*, 749 F.2d at 462; *Charles I*, 627 F.2d at 789.

Intervenor asserts that §§ 2(10) and 11(d) do not burden any woman seeking contraceptives (Int. Br. 22) but exist solely to advance the interests of those women who, for religious or moral reasons (Int. Br. 11), oppose methods of birth control that act upon the fertilized ovum. By making this accom-

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advances the State's interest in protecting the health of the *pregnant* woman making that choice. The women affected by §§ 2(10) and 11(d) are not pregnant. By their express terms, §§ 2(10) and 11(d) require the abortifacient labeling "whether or not the fetus is known to exist." Intervenor does not, indeed cannot, cite any decision of this Court approving regulation of non-pregnant women on behalf of non-existent fetuses.

[28] Relying upon *Roe*, the district court enjoined sections 2(9), 2(10), and 11(d). *Charles II*, 579 F. Supp. at 379; *Charles III*, 579 F. Supp. at 475. Intervening defendant has not appealed the injunction on § 2(9). HB 1399 did not repeal § 2(9), contrary to the assertion made by the Acting Solicitor General. (S.G. brief at 15, n.3.) P.A. 83-1128, § 2. Rather than abandon the theory of human life advocated by § 2(9), the General Assembly in HB 1399 merely renumbered it as § 2(6), which now provides:

> "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth.

odation defense intervenor disregards the expressed purpose of the Abortion Law, as stated in § 1 which, together with §§ 2(10) and 11(d) requires transmission of misleading information that presents one theory of human life.[29]

That some women may accept the State's theory of life is not a compelling constitutional reason to impose §§ 2(10) and 11(d) upon all physicians and their female patients. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). *See also West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).[30] This First Amendment interest is particularly strong when the State compels speech on a controversial issue, such as birth control. *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2282 (1985).

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[29] Governmental purpose when regulating fundamental rights cannot be disregarded, particularly when that purpose is hostile to the right at issue. This Court recently relied upon an improper governmental purpose in finding that the Alabama moment of silence statute violated the First Amendment. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2492 (1985).

[30] Intervenor's citation of *In re R.M.J.*, 455 U.S. 191 (1982), and *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), in support of this forced speech disregards not only the context in which these cases evolved but also their holdings. These cases involved professional advertising — commercial speech — which receives less First Amendment protection than does other speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983). In both cases, this Court substantially upheld the attorney's First Amendment right to engage in the challenged speech. Neither case allowed broad, unreviewed state regulation of speech, particularly speech concerning a fundamental right. More specifically, in neither case were professionals required to deliver a state proscribed message or face criminal prosecution. The speech involved in the doctor-patient communications is not advertising. As this Court recognized in *In re R.M.J.*, it is professional advertising that poses a special risk of deception, not all speech by professionals to their clients or patients. 455 U.S. at 200, *citing Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Intervenor's argument that physicians are not required to use the statutory language of "abortifacient" and "fetal death" when conferring with patients is unpersuasive.[31] This construction is inconsistent with earlier constructions offered by intervenor. In the court of appeals, intervenor consistently argued that §§ 2(10) and 11(d), at the least, require a physician to report to the woman "that he is administering an abortifacient." ("Int. Opening Br. at 6-7, filed May 23, 1984.) Intervenor gave the same construction in the court of appeals during *Charles I*, and further stated; that the term "[a]bortifacient is thus specifically designed to identify *products* which are administered in order to cause fetal death *if the fetus exists or should the fetus come into existence.*" (Int. Jt. Memo., filed Nov. 28, 1979 (emphasis original).)[32]

Intervenor's contention in this Court that "[t]he precise manner in which the doctor discloses [the abortifacient] information is left entirely to his discretion" (Int. Br. 11-12) disregards the coercive force of a criminal law. Given the statutory mandate that requires the abortifacient label "whether or not the fetus is known to exist," a physician "[f]aced with the penalties that would accrue . . . might well conclude that the safe course is to avoid controversy," *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974), and therefore use the precise statutory language.

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[31] No state enforcement official has ever independently advanced the limiting construction now advanced by intervenor for purposes of litigation in this Court. Indeed, Attorney General Hartigan and State's Attorney Daley have never advanced any construction, but merely have adopted intervenor's court of appeals briefs. Arguments of counsel, particularly non-governmental counsel, are entitled to little weight as a valid limiting construction. *Investment Co. Inst. v. Camp.*, 401 U.S. 617, 627-28 (1971).

[32] Most of the alternative terms offered by intervenor (Int. Br. 12) — "causes an abortion," "causes fetal death," "kills unborn children" — only emphasize the integral and impermissible relationship between the challenged statutes and the State's theory that life begins at fertilization.

C. The "Informed Consent" Requirements In §§ 2(10) And 11(d) Are Unconstitutional Because They Are Uncertain In Scope And Vague As To Meaning.

The constitutional infirmities of §§ 2(10) and 11(d) are compounded by their vagueness, offending due process in three related ways. They fail to afford persons "a reasonable opportunity to know what is prohibited"; they fail to provide explicit standards for those who apply them, inviting arbitrary and discriminatory enforcement; and, they operate "to inhibit the exercise of . . . [protected] freedoms . . . [by] inevitably lead[ing] citizens to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Sections 2(10) and 11(d) fail to give clear guidelines as to what conduct is required, and under what circumstances.

First, intervenor relies on § 2(10)'s definition of abortifacient to cure any uncertainty about what substances are governed by the mandatory warning of § 11(d). (Int. Br. 9.) This definition only compounds the confusion. Section 11(d) appears to impose criminal liability when the person is "selling, administering, or prescribing" a substance "which he knows [subjectively] to be an abortifacient, and which is in fact an abortifacient, . . ." Section 2(10), upon which § 11(d) depends, countermands that subjective knowledge requirement by defining abortifacient according to an objective standard of knowledge, *i.e.*, "any substance or device *known* to cause fetal death." (Emphasis added.) Because it is "unclear whether [this criminal] statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard," it is void for vagueness. *Colautti*, 439 U.S. at 391.

Second, these provisions do not clearly delineate what substances are considered "abortifacients." Literally hundreds of drugs and devices are suspected to increase the chances of spontaneous abortion which arguably would "cause fetal death" under the statute.[33] Persons uncertain of the applicability of the "abortifacient" label may nonetheless face prosecution.

Third, § 11(d) has a separate prohibition which attempts to stop completely the sale of certain birth control substances. The first criminal provision in § 11(d) forbids "any person" from selling an abortifacient, as defined by § 2(10), "unless upon prescription of a physician. . . ." Read literally, § 11(d) forbids drug manufacturers from selling products which come under § 2(10)'s definition because doctors do not and cannot write prescriptions directly to drug manufacturers. Manufacturers who sell to drug wholesalers, hospitals and pharmacists are exempt from federal requirements that certain drugs and devices be dispensed only by prescription. 21 C.F.R. § 201.100 (1985). Under §§ 2(10) and 11(d), however, these drug manufacturers could not market their contraceptive products in Illinois. Such a total ban on contraceptive sales contravenes the decision in *Carey*, 431 U.S. 678 (1977).

Fourth, § 11(d)'s lack of clarity is exacerbated when read in conjunction with § 11(f) of SB 47, or its successor, § 11(4) in HB 1399.[34] Section 11(f) makes it a Class 2 felony for any

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[33] Anti-malarial drugs such as quinine, chloroquin, coumarin anti-coagulants, chloramphenicol, thiazide diuretics, insulin (shock) and polio vaccine, all may cause "fetal death" or spontaneous abortion. *See, e.g.*, Strombino, *et al., Chemical and Physical Exposure of Parents: Effects on Human Reproduction and Offspring*, J. Early Human Development, 371-399 (1978); Wilson, J.G. and Frasier, F.C. eds., Handbook Of Teratology, Vol. 1: General Principles and Etiology (1977), Schardin, J.L. ed., Drugs As Teratogens (1976).

[34] Sections 2(10) and 11(d) although renumbered by HB 1399 as §§ 2(7) and 11(3), remain a part of the Abortion Law. Thus, the

(Footnote continued on following page.)

person to "perform . . . an abortion procedure upon a woman who is not pregnant. These three provisions create an unavoidable "catch-22" threat of prosecution for physicians.

Under §§ 2(10) and 11 (d), a physician is compelled to apply the abortifacient label "whether or not the fetus is known to exist." According to intervenor, a physician could explain certain birth control substances as "caus[ing] an abortion." (Int. Br. 12.) A physician who uses this language when giving a woman an IUD would be subject to prosecution under § 11(f) for performing what *is represented to be an abortion* upon a woman who is not pregnant. Thus, if the physician complies with § 11(d), § 11(f) may be invoked. If, however, the physician declines to apply the abortifacient label because of § 11(f), he or she may be prosecuted under § 11(d).

In summary, §§ 2(10) and 11(d) do not provide either the persons regulated or the enforcement officials with the necessary direction to know under what circumstances and to whom the "abortifacient warning" must be given. By conditioning criminal liability on such confusing and ambiguous criteria, §§ 2(10) and 11(d) present "serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Colautti,* 439 U.S. at 394.

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relationship of §§ 2(10) and 11(d) with other provisions of the Abortion Law must be considered when analyzing their constitutionality. The district court found § 11(f) unconstitutionally vague. *Charles II,* 579 F. Supp. at 384. Plaintiffs consistently have urged that the Abortion Law is unconstitutionally vague. (*See, e.g.,* Joint Br. of Plaintiffs-Appellees filed in Seventh Circuit, Dec. 13, 1978.)

III. SECTION 6(1) CONDITIONS CRIMINAL LIABILITY ON VAGUE STANDARDS AND DOES NOT ASSURE PROTECTION OF THE WOMAN WHOSE HEALTH OR LIFE NECESSITATES THE PERFORMANCE OF A POST-VIABILITY ABORTION.

A. Because It Does Not Clearly Specify That The Attending Physician's Viability Determination Controls, § 6(1) Is Void For Vagueness.

Twice before in this decade, the Court has struck down as vague state criminal statutes that penalized physicians for failing to exercise a certain standard of care toward the fetus during an abortion. *Colautti*, 439 U.S. 379 (1979); *Danforth*, 428 U.S. 52 (1976).[35] These rulings dictate that § 6(1) be found unconstitutional as well.

Section 6(1) regulates post-viability abortions.[36] Its application, however, is not limited to those fetuses which the attending physician determines are viable. Section 6(1) also applies to fetuses which are "known to be viable" by persons other than the attending physician. Thus, § 6(1), contravenes *Colautti's* unequivocal holding that "'the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.'" *Charles IV*, 749 F.2d at 459, *citing Colautti*, 439 U.S. at 396.

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[35] Intervenor's contention that the court of appeals "adopted a standard of review that is far more hostile to state regulation of abortion after viability than any which has been adopted by this Court," (Int. Br. 36 n.22), disregards these decisions. The State is not required, as intervenor contends, "to legislate the parameters of medical judgment," *id.*, but it is required by these rulings to provide sufficient notice to physicians of what conduct will be considered criminal.

[36] Section 6(1) provides, in full:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve

(Footnote continued on following page.)

Conceding that § 6(1) is unconstitutional if the attending physician's viability determination does not control, intervenor now argues that the attending physician's determination does control because § 6(1) is modified by the definition of viability in § 2(2). (Int. Br. 33-34, 47.) Intervenor's construction of § 6(1) is not supported by the history of the Abortion Law and is inconsistent with other provisions of that law, as amended by SB 47.

Prior to the enactment of SB 47, § 6(1) was construed as positing the determination of viability with the attending physician. *Wynn v. Scott*, 449 F. Supp. 1302, 1315 (N.D. Ill. 1978).[37] Following this decision, however, the General Assembly enacted SB 47, which amended § 6(1) by inserting the phrase "known to be," in front of the term "viable." Intervenor ignores this change and argues that § 6(1) means the same whether the phrase "known to be" appears in front of "viable" or not.

The second sentence of § 6(1) also employs the "known to be" phrase:

> Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such mea-

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> the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus results from such failure.

Ill. Rev. Stat. ch. 38, ¶ 81-26(1) (1983). A Class 2 felony is punishable by imprisonment for "not less than 3 years and not more than 7 years. . . ." Ill. Rev. Stat. ch 38, ¶ 1005-8-1(a)(5) (1983).

[37] The statute construed in *Wynn* provided in part: "no person who performs or induces an abortion after the fetus *is viable*. . . ." (Emphasis added.)

> sures to encourage or to sustain the life of the fetus *known to be viable*, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results . . ..

(Emphasis added.) Intervenor compounds the ambiguity of the "known to be" phrase by arbitrarily assigning the phrase a different meaning in the second sentence. According to intervenor, the phrase "known to be viable," as applied to a physician, means the same as "viability," which is defined in § 2(2).[38] He argues, however, that that same phrase, as applied in § 6(1)'s second sentence to a person assisting a physician, means "that he or she knew that the attending physician had made a determination of viability . . .." (Int. Br. 24.) Intervenor's argument that "known to be viable" has one meaning for physicians and another for everyone else, makes the phrase superfluous as applied to physicians and ambiguous as applied to all others. His construction, advanced only for purposes of this litigation, violates "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti*, 439 U.S. at 392 (citation omitted).[39]

The mere possibility that a criminal standard of care might be invoked, even when the attending physician determines the fetus is not viable, "portends not an inconsequential hazard for the typical private practitioner who may not have the skills and technology that are readily available at a teaching hospital or large medical center." *Colautti*, 439 U.S. at 391-92. The

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[38] When the General Assembly wanted the physician's subjective determination of viability to control, as it does in § 2(2), it incorporated express language to that effect. For example, in adopting SB 47, the legislature added § 6(4) to the law, which specifically incorporated the language of § 2(2), making it clear that the "possibility" of viability was to be determined according to the "medical judgment of the physician performing the pregnancy termination." Ill. Rev. Stat. ch. 38, ¶ 81-26(4) (1983).

[39] Intervenor's suggestion that the court of appeals erred in not adopting his construction of § 6(1) is frivolous. No limiting construction of § 6(1) was offered that court by the State. Certainly the State's adoption of intervenor's briefs in the court of appeals is not a sufficient or binding statutory construction. *Investment Co. Inst. v. Camp.*, 401 U.S. 617, 627-28 (1971).

ambiguity in § 6(1), no less than the fatal ambiguity in *Colautti*, chills the exercise of a woman's fundamental right. Thus, the Seventh Circuit correctly ruled it unconstitutionally vague under this Court's decisions in *Colautti* and *Danforth*. *Charles IV*, 749 F.2d at 460.

B. Section 6(1) Deprives A Woman Whose Life Or Health Necessitates A Post-Viability Abortion Of Her Fundamental Rights.

Intervenor recognizes that the woman's right to life and health must be preeminent in post-viability abortions. (Int. Br. 36, 47.) This preeminence has long been protected.[40] Indeed, even before *Roe*, states universally permitted abortions necessary to save the woman's life and health. *Roe*, 410 U.S. at 157 n.54. In defending §§ 6(1) and 6(4), intervenor relies on § 6(5) as the statutory enunciation of that preeminence. Section 6(5), however, weakens rather than strengthens intervenor's argument that these sections are valid.

Post-viability abortions are available only when necessary to preserve the woman's life or health. Ill. Rev. Stat. ch. 38, ¶ 81-25(1) (1983). Section 6(1) requires the physician performing a post-viability abortion to exercise "that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." Only the period of time "during the course of" the termination procedure is exempted, by § 6(5), from § 6(1)'s general command to do everything necessary to preserve fetal life.[41] Thus, any increased risk to the

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[40] Any conflict between the woman's health and the potential life of the fetus must be resolved in favor of the woman's health. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 485 n.8, 501-02 (1983) ("*Ashcroft*"). *See also Colautti*, 439 U.S. at 400.

[41] Section 6(5), as contained in SB 47, specifically provides:

> Nothing in Section 6 requires a physician or any other

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woman does not control a physician's considerations when, prior to the "course of the termination" procedures, he or she selects the [abortion] technique to be used.[42]

The Illinois legislature enacted § 6(5) after § 6(1) had been interpreted to mean that a physician need not take any action, prior to, during, or after the pregnancy termination, that entailed a greater risk to the woman's health. *Wynn v. Scott*, 449 F. Supp. 1302, 1321 (N.D. Ill. 1978).[43] Rather than allow that broad interpretation, clearly necessary to avoid unconstitutionality, to stand, the legislature passed § 6(5) thereby restricting the impact of the court's ruling.[44]

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> person to employ any measures to encourage or to sustain the life of the fetus *during the course of a pregnancy termination* which, in the medical judgment of the physician *performing* the pregnancy termination based on the particular facts of the case before him, would increase the medical risk to the mother.

(Emphasis added.) That this version of § 6(5) is not intended to apply during the selection of technique process is emphasized by the new provisions of § 6(5), as amended by HB 1399. The new § 6(5) states in part that "[n]othing in Section 6 requires a physician to employ a *method of abortion* which . . . would increase medical risk to the mother." (Emphasis added.)

[42] As Justice Blackmun noted, "[t]he choice of method presumably will be made in advance" of the abortion procedure. *Ashcroft*, 462 U.S. at 500 (Blackmun, J., dissenting).

[43] In *Wynn*, the district court interpreted § 6(1) to mean that when a physician has a choice of procedure, both of equal risk to the woman, the physician must choose the procedure which is least fatal to the fetus. 449 F. Supp. at 1321. This interpretation of § 6(1), which was not made by the Illinois Supreme Court, is not binding on this Court or the State. *Simopolous v. Virginia*, 462 U.S. 506, 510 (1983); *Colautti*, 439 U.S. at 400.

[44] By citing *Wynn* in support of § 6(1), intervenor deliberately disregards SB 47's subsequent amendments to § 6, which added § 6(5) to the Abortion Law. *Wynn* was decided well before the legislature enacted SB 47 on October 30, 1979. 1 Final Legislative Synopsis and Digest of the 1979 Session of the Eighty-first General Assembly, State of Illinois 40-41 (1979).

The plain meaning of the phrase "during the course of" is reinforced by the fact that it is not used anywhere else in the statute. Had the legislature intended to have § 6(5) apply to selection of method, it would have phrased § 6(5) to so read.[45] By subordinating consideration of the woman's life or health when the technique is selected, § 6(1) impermissibly intrudes upon the physician-patient relationship and deprives the woman of the fundamental right to have her life and health be paramount during the entire post-viability abortion process. *Ashcroft*, 462 U.S. at 483-85; *Colautti*, 439 U.S. at 398-400.

Even during the termination process itself, § 6(5) does not adequately protect the woman's life or health. Contrary to intervenor's suggestion, § 6(5) does not make it clear that the physician must only "make use of available measures to preserve fetal life or health, provided such measures would pose no increased risk to maternal life or health." (Int. Br. 36.) Section 6(5) relieves a physician of the obligation to preserve fetal life or health *only* when such measure would increase "the medical risk" to the woman.

Nowhere in the Abortion Law is the term "medical risk" defined. To suggest, as does intervenor, that "medical risk" means "risk to the woman's life or health" is mere speculation.[46] Section 6(1), even as modified by § 6(5) during the actual abortion procedure, leaves "uncertain whether the stat-

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[45] The other case intervenor cites in support of his argument that § 6(5) modifies § 6(1) is no more persuasive than is *Wynn* or the statutory language. *Planned Parenthood of Kansas City v. Ashcroft*, 655 F.2d 848, 863-64 (8th Cir. 1981), is inappropriate because, unlike § 6(1), the Missouri statute at issue expressly required the physician to consider the life and health of the woman when choosing the abortion technique. 655 F.2d at 862 n.21.

[46] Intervenor's reliance upon *United States v. Vuitch*, 402 U.S. 62 (1971), to save the constitutionality of § 6(1) is misplaced. (Int. Br. 36.) The statute in *Vuitch* specifically used the term "health." Prior constructions of the term health made it clear that health included

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ute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." *Colautti*, 439 U.S. at 400.

Had the General Assembly intended to use the phrase "increase the risk to the woman's life or health" in § 6(5), it knew how to do so. It specifically employed the phrase "necessary to save the life or health of the woman" in § 5(2) of the statute, which limits post-viability abortions to life or health threatening situations. By using the term "medical risk" instead, the General Assembly conveyed a different meaning.

1. **This section denies a woman of the medical care that she needs and advice upon which she can rely.**

As a pregnancy progresses, the risks of an abortion increase.[47] A post-viability abortion, performed only when necessary to save a woman's life or health,[48] demands a patient-

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both physical and mental health. Thus, this Court found that the statute was not unconstitutionally vague. 402 U.S. at 71-72. *See also Colautti*, 439 U.S. at 393-94. Here, there have been no interpretations of "medical risk" by the Illinois courts. Thus, intervenor's citation of *Vuitch* for the proposition that medical risk means "increased risk to the woman's life or health" is incorrect.

[47] Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization 158 (J.E. Hodgson ed. 1981); Centers for Disease Control, Dept. of Health and Human Services, *Abortion Surveillance 1979-1980* (1983).

[48] Health considerations that necessitate a post-viability abortion are often emergencies, *Ashcroft*, 462 U.S. at 485, and include: cardiovascular disease, cervical or ovarian cancer, pre-eclampsia, high blood pressure, kidney disease, and certain respiratory, urinary or neuromuscular disorders. *See generally* Romney, Gray, Little, Merrill, Quilligan & Standler, Gynecology & Obstetrics 703, 705-08, 710, 712-14, 718, 722, 724, 726, 729, 732, 739, 756, 762, 764, 776, 778, 783-84, 793, 795 (2d ed. 1981). *See also* J. Pritchard & P. MacDonald, Williams, Obstetrics 477 (17th ed. 1985).

physician relationship which promotes consultation and reliance upon the doctor's advice "in determining how any abortion [is] to be carried out." *Colautti*, 439 U.S. at 387. In regulating post-viability abortions, States may not limit a woman's right to receive her physician's best medical advice, nor deny the physician the discretion needed to effectuate the abortion decision. *Akron*, 462 U.S. at 429-30, 445; *Colautti*, 439 U.S. at 398-401.

Section 6(1) infringes on the rights of women needing post-viability abortions by establishing a standard of care which forces their doctors, under threat of criminal prosecution, to maximize efforts to preserve the fetus, no matter how futile.[49] By forcing the consideration of fetal interests at every stage of the medical care to be rendered — diagnosis, evaluation of risk, advising the patient, selecting the method, performing the procedure — § 6(1) diminishes the standard of care to which a woman is entitled, even if § 6(5) applies.

Operating under the threat of prosecution, a physician will be unlikely to provide care which is not, in some way, skewed

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[49] A study of late second trimester abortions (20-24 weeks) found that 3.4% of the prostaglandin induction abortions resulted in a live birth and 0.3% of saline abortions did. None of the fetuses survived. Robins & Surrago, *Alternatives in Midtrimester Abortion Induction*, 36 Obstet. & Gynecol. 716-20 (1980). *See also* notes 56, 57, *infra*.

Live births do not mean that viable infants are being born. For official statistical purposes 45 states, including Illinois, define "live birth" as a "product of conception, irrespective of the duration of the pregnancy which . . . breathes or shows any other evidence of life such as beating of the heart . . . or definite movement of voluntary muscles." National Office of Vital Statistics DHEW, *International Recommendations in Definitions of Live Birth and Fetal Death*, Washington, D.C. (1950), cited in Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 263 (1984) ("Grimes"). *See also*, Ill. Rev. Stat. ch. 111½, ¶ 73-1(5) (1983). Most live births are of premature fetuses which do not have the capacity for more than momentary survival. Grimes, *supra*, at 263-64.

contrary to the woman's interest. Worse, a woman receiving such care and advice may never know that considerations for the fetus, rather than for her own health, shaped this advice. Such a result robs a woman of the medical advice upon which she is entitled to rely. *Akron*, 462 U.S. at 427.

2. Intervenor falsely assumes that some methods present equal risk to the woman and to the fetus.

The assumption upon which intervenor rests his argument that § 6(1) creates no burden to the abortion right — that risks to the woman and to the fetus posed by various abortion procedures are objectively quantifiable—ignores the myriad of factors necessarily involved in the selection of the abortion method in any individual case. The confusion resulting from intervenor's myth of easy choices, coupled with the possibility of criminal penalties should the doctor's decision differ from that of those later reviewing his action, will chill physicians' participation in the implementation of a woman's right to obtain an abortion.

Current post-viability abortion techniques include dilatation and evacuations (D&E), intra-amniotic instillation of solutions containing saline, prostaglandin, urea, or some combination of those substances, prostaglandin E2 suppositories, oxytocin, or an eclectic mixture of several techniques.[50] No one

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[50] Romney, Gray, Little, Merrill, Quilligan & Standler, Gynecology & Obstetrics 841-43 (2d ed. 1981); Hern, *Serial Multiple Laminaria & Adjunctive Urea in Late Outpatient Dilitation & Evacuation*, 63 Obstet. & Gynecol. 543 (1984). *See also* Hern, Abortion Practice 22-23 (1984) (second trimester techniques). Because of the increased danger of death and major complications, hysterotomy and hysterectomy procedures are rarely used. *See, e.g.*, Hern, Abortion Practice 28 (1984); P. Diggery, *Hysterotomy and Hysterectomy as Abortion Techniques*, in Abortion And Sterilization: Medical and Social Aspects 331 (J. Hodgson ed. 1981); Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion And Sterilization: Medical and Social Aspects 161 (J. Hodgson ed. 1981).

abortion technique will be appropriate for all women. *Colautti*, 439 U.S. at 398-99. Rather, the decision must reflect the particularized medical problems which led to the woman's need for a post-viability abortion, as well as the many risks and contradictions known to be associated with each abortion technique.[51]

Into this already "complex medical judgment about which experts can — and do — disagree," *Collautti*, 439 U.S. at 401, intervenor would impose an obligation toward the fetus, although its interests may be diametrically opposed to those of the woman in need of the abortion.

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[51] It is generally recognized today that during the second trimester the safest procedure to ensure the woman's life and health, when properly performed, is the D&E, the very same procedure which results inevitably in fetal death. *Akron*, 462 U.S. at 436. *See also* Grimes, Schultz, Cates & Tyler, *Methods of Midtrimester Abortion: Which is Safest*, 15 Int. J. Gynaecol. Obstet. 184 (1977). Hypertension, asthma, glaucoma and epilepsy are all contraindications for prostaglandin abortions. Hern, Abortion Practice 125 (1984). Complications include severe respiratory and cardiovascular problems, chills, fever, coughing and shortness of breath. Other side effects include gastro-intestinal complications, nausea, vomiting and diarrhea. Kerenyi, *Intra-amniotic Techniques*, in Abortion And Sterilization: Medical and Social Aspects 368 (J. Hodgson ed. 1981) ("Kerenyi, *Intra-amniotic Techniques*"). For saline instillation abortions, contraindications include hypertension, sickle cell disease, anemia, heart disease, kidney disease and blood coagulopathy. Kerenyi, *Intra-amniotic Techniques, supra*, at 363-66; Kerenyi, *Hypertoxic Saline Instillation*, in G.S. Berger, et al., Second Trimester Abortions: Perspectives After A Decade's Experience 179 (1981); Niswander, Manual Of Obstetrics 22 (1980). Frequent complications from saline abortions include hemorrhage and infection, although hypernatremia is also reported. Kerenyi, *Intra-amniotic Techniques, supra*, at 363.

In light of the inherent subjectivity of this medically-based decision, the threat of criminal prosecution posed by § 6(1) is nothing more than "a trap for those who act in good faith." *Colautti*, 439 U.S. at 395 (citation omitted).

IV. SECTION 6(4) IS NOT SUPPORTED BY A COMPELLING STATE INTEREST IN FETAL LIFE OR WOMEN'S HEALTH AND IS THEREFORE UNCONSTITUTIONAL.

A. Because § 6(4) Severely Restricts Abortions Prior To Viability, It Is Unconstitutional.

Section 6(4) imposes the same unconstitutionally vague standard of care upon physicians and their assistants who perform abortions as does § 6(1).[52] Although intervenor's

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[52] Section 6(4) of the Abortion Law, as amended by SB 47 and HB 666, provides:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such a failure.

Violation of § 6(4) is a Class 3 felony punishable by imprisonment for "not less than 2 years and not more than 5 years; . . ." Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(6) (1983). Because § 6(4)'s standard of care is the same as § 6(1)'s, § 6(4), like § 6(1), is unconstitutionally vague and chills the physician in the exercise of his medical judgment. *See* discussion *supra*, at 31-37.

argument is not clearly articulated, he apparently argues first that § 6(4) applies only at a time when the State's interest in fetal life is compelling (Int. Br. 44)—*i.e.*, viability—and second that if § 6(4) does apply at some previability stage, it is permissible because the State's interest, even if not compelling, is "at least very substantial." (Int. Br. 45.) Intervenor's argument resurrects the losing argument in *Colautti* in a disingenuous justification of the State's attempt to regulate abortion prior to viability. If "the doctrine of *stare decisis* . . . demands respect in a society governed by the rule of law," *Akron*, 462 U.S. at 419-20, the holding of *Colautti* dictates that intevenor's tired argument on § 6(4) once again be rejected.

In *Colautti*, this Court struck down a statute which did not clearly restrict its limitations to the post-viability phase of pregnancy. In reaching this decision, the Court rejected the argument that the phrase "is viable" had precisely the same meaning as did the term "may be viable." 439 U.S. at 392-93. Despite this clear holding, intervenor argues that § 6(1) and § 6(4) both are constitutional because both sections apply when the state has a compelling interest in fetal life. Intervenor's construction of § 6(4) ignores the differences between the express language of each section. Section 6(1), by its express terms, applies only at viability *i.e.*, "that stage of fetal development when . . . there is a reasonable likelihood of sustained survival . . . outside the womb. . . ." Ill. Rev. Stat. ch. 38, ¶ 81-22(2) (1983). By contrast, § 6(4), again by its express terms, applies whenever there is "a *possibility* . . . of sustained survival apart from the body of the mother. . . ." (Emphasis added.)

Intervenor asks this Court to construe § 6(4) so as to convert "a possibility" into a "reasonable likelihood" of sustained survival, a result contrary to the obvious semantical differences between these terms. To accept intervenor's construction would condition criminal liability on confusing criteria. Thus, § 6(4), like the confusing alternative "is viable" or "may be viable" standard struck down in *Colautti*, is unconstitutionally vague. 439 U.S. at 393.

Intervenor's further argument that § 6(4) is constitutional because its "possibility" standard is encompassed within the *Roe* definition of viability and therefore is more inclusive than the "conservative" definition of viability found in § 2(2) of the Abortion Law (Int. Br. 44), misreads *Roe* and its progeny. Section 2(2) defines viability in *exactly* the same language used by this Court in *Colautti*. *Compare Colautti*, 439 U.S. at 388, *with* Ill. Rev. Stat. ch. 38, ¶ 81-22(2) (1983). Thus, the definition in § 2(2) is no narrower than the definition of viability approved in *Roe*.[53]

Here, as in *Colautti*, the "crucial point" is that § 6(4)'s "possibility of sustained survival" and § 6(1)'s "reasonable likelihood of sustained survival" refer to distinct conditions in gestation. Thus, "one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in [Danforth.]" *Colautti*, 439 U.S. at 394. Pared to its most basic form, intervenor argues simply that the State should be permitted to circumscribe a woman's fundamental right of privacy prior to viability,[54] an argument consistently rejected by this Court. *Colautti*, 439 U.S. 392-93; *Danforth*, 428 U.S. at 82-84.[55]

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[53] In *Roe*, this Court found that a fetus is viable if it is "potentially" able to live outside the uterus. *Roe*, 410 U.S. at 160. Intervenor's attempt to equate § 6(4)'s "possibility" language with the express language of *Roe* is no more persuasive than his argument that "possible" means the same as "reasonable likelihood."

[54] Intervenor concedes as much in his Jurisdictional Statement. (Juris. St. at 52.)

[55] In *Danforth*, this Court struck down a Missouri statute, substantially the same as § 6(4), which imposed criminal penalties upon physicians performing abortions, even prior to viability, if said physician failed "to exercise that degree of professional, skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." *Danforth*, 428 U.S. at 85.

Evading this Court's express holdings, intervenor attempts to justify § 6(4) by citing medical statistics (Int. Br. 45-46) for the proposition that technology has resulted in viability determinations at an earlier gestational age than was the case in *Roe*. This recitation of medical statistics merely states the obvious. In *Roe*, this Court noted that although "[v]iability is usually placed at about seven months (28 weeks), [it] may occur earlier, even at 24 weeks." 410 U.S. at 160. Technological advances would, necessarily, affect the viability determination. *Id. See also Colautti*, 439 U.S. at 387. Despite the dissent's assertions in *Akron*,[56] accepted medical authorities, even those quoted by intervenor, agree that technological advancements simply have not occurred so as to enable the fetus to have "the capability of meaningful survival outside the mother's womb" at a much earlier time than the 24-week period suggested by this Court in *Roe*.[57] Worthington, *et al.*,

[56] The dissent's statement that it is "certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future," *Akron*, 462 U.S. at 457, is not supported by the medical literature cited for this proposition. For example, the dissent cites Philip, *et al.*, *Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups*, 68 Pediatrics 122 (1981) for the proposition that infants "with a gestational age of 25 weeks and weight between 500 and 1,249 grams have a 20% chance of survival." The Philip data show that of 523 premature neonates treated in a regional intensive care unit between 1976-1979, only five were of 25 weeks gestational age or less. Two of those neonates weighed between 500-749 grams; both died. One weighed between 750 and 999 grams; it died. Two of the neonates weighed between 1,000 and 1,249 grams; only one survived. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1023 n.245 (1984) ("Law"). The other authority cited by the dissent likewise provides no support for viability during the first trimester of pregnancy. Law, 132 U. Pa. L. Rev. at 1023 n.245.

[57] Intervenor's contention that the survival rate now approaches 50% for neonates with a 24-week gestational age is not supported by either his chart or the underlying medical authorities. Intervenor first distorts the results of the case studies by failing to disclose that the

(Footnote continued on following page.)

Factors Influencing Survival and Morbidity With Very Low Birthweight Delivery, 62 Obstet. & Gynecol. 550, 555 (1983):

(*Footnote continued from preceding page.*)
survival rates apply *only* to neonates who were delivered "live born." The rates do not reflect those neonates delivered at a comparable gestational age who were still-borns. The results are further skewed by the fact that many of the case studies encompassed a select group of neonates, excluding some referrals and not treating those neonates who were not referred to regional centers. Gilstrap, et al., *Survival and Short Term Morbidity of the Premature Neonate*, 65 Obstet. & Gynecol. 37, 38 (1985).

Intervenor's medical data does not support his contention that, in recent years, 50% of neonates delivered at 24 weeks survive. (Int. Br. 45.) Starting with the Worthington study (source # 8 in intervenor's chart) which analyzed 185 "live births" in Wisconsin, neonates delivered at 24 weeks suffered a 100% *mortality* rate, as did neonates delivered at 23 weeks and 22 weeks. Worthington, *et al., Factors Influencing Survival and Morbidity With Very Low Birthweight Delivery*, 62 Obstet. & Gynecol. 550, 551 (1983). This is a far cry from the 50% survival rate claimed by intervenor. Similarly, the Milner and Beard study (source # 12) reports a 16% survival rate among 24 week neonates, not a 50% rate. Milner & Beard, *Limits of Fetal Viability*, 1984 LANCET 1079. This report was based on a survey of 31 neonatal care units in the United Kingdom, many of which used different definitions of viability and for gestational age. *Id.*

The Gilstrap study (source #13) is the only one of the thirteen sources cited by intervenor which provides any support for his claimed survival rate. During the five year study period, only six neonates at 24 weeks were live born and treated. Of those six, only 3 survived. Gilstrap, *et al., Survival and Short Term Morbidity of the Premature Neonate*, 65 OBSTET. & GYNECOL. 37, 38 (1985). Thus, intervenor bases his claimed 50% survival rate on three neonates. The distortion of reaching intervenor's conclusion based on these data is illustrated by the report in the same study that, of seven infants born alive one week older in gestational age, only two survived. The authors compute an overall survival rate of 39% through the 26th week; of those survivors, one third suffered moderate to severe damage.

(*Footnote continued on following page.*)

Koops *et al; Neonatal Mortality Risk in Relation to Birth Weight and Gestational Age Update*, 101 J. Pediatrics 969, 972 (1982). *See also* Goldenberg *et al., Neonatal Mortality in Infants Born Weighing 501-1,000 Grams*, 151 Am. J. Obstet. Gynecol. 609, 609 (1985).

The flexibility necessarily afforded physicians allows them to take into consideration developments in technology and medical skill when making a viability determination.

B. Section 6(4)'s Standard Of Care Provision Unconstitutionally Interferes With The Woman's Exercise Of Her Fundamental Right.

Repeating his analysis of § 6(1), intervenor argues that § 6(4) does not burden the woman's right to terminate her pregnancy, because it does not forbid abortions. (Int. Br. 39-43.) As with § 6(1), that argument ignores the fact that this fundamental right has two components: making the decision and then implementing it. *Akron*, 462 U.S. at 427.

(Footnote continued from preceding page.)

Intervenor's survival chart based on birth weight is equally misleading. He deliberately aggregated separate categories of birth weight to suggest a higher rate of survival at lower birth weights, thereby implying that fetuses survive at much younger gestational ages than previously thought. For example, intervenor reports a 24% survival rate for neonates in the 500-800 gram range in the Kraybill study (source # 6). Rather than report the survival rates for the individual weight ranges selected by the researchers as significant, he aggregates three previously separate ranges to secure a statistic more suggestive of survival at an earlier gestational age. Broken down precisely according to the researchers' categories, the survival rates plummet in the lower birth weights. For the neonates weighing between 501-600 grams, there was a 100% mortality rate. For neonates weighing between 601-700 grams, there was a 83% mortality rate. Only for neonates weighing between 701-800 grams was there a significant survival rate — 62%. Kraybill, et al., *Infants With Birthweights Less than 1,000 g: Survival, Growth and Development*, 138 Am. J. Diseases Children 837, 840 (1984).

Section 6(4) patently interferes with a woman's right, in consultation with her physician, to obtain an abortion most protective of her life and health. Like § 6(1), § 6(4) does not allow a physician to make the woman the focal point of medical decision-making. Rather, consideration of the fetus — even though it is a fetus with only a "possibility" of survival — is interjected in the physician's decision-making. See 31-37, *supra*. Moreover, the vagueness of the statutory duties imposed by § 6(4), coupled with the virtual impossibility of determining when "a possibility of viability exists, will have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment." *Colautti*, 439 U.S. at 396.

> As the court of appeals correctly stated:
>
> [T]he State's interest in preserving fetal life, becomes compelling only at the stage of viability. *Roe v. Wade*, 410 U.S. at 163, 93 S. Ct. at 731. As a consequence, the State's interest in preserving fetal life cannot justify section 6(4) because section 6(4) applies to certain pre-viability abortions. . . . Because the State has advanced no other compelling interest which could justify section 6(4)'s restriction on a woman's freedom to choose an abortion, this Court must find that section 6(4) unconstitutionally infringes on the woman's fundamental right. Section 6(4) is therefore invalid.

Charles IV at 461. This holding, which was dictated by *Danforth*, 428 U.S. at 82-84, and *Colautti*, 439 U.S. at 386-87 n.7, must be affirmed.

V. THE CONSTITUTIONALITY OF AMENDED §§ 6(1) AND 6(4) IS NOT PROPERLY BEFORE THIS COURT.

Intervenor seeks original review in this Court of the constitutionality of HB 1399's amendments to §§ 6(1) and 6(4). This position is contrary to the position advanced by intervenor in the court of appeals and contrary to the legal authority he cites.

Intervenor advised the court of appeals, that amended §§ 6(1) and 6(4) were under review in *Keith v. Daley*, No. 84

C 5602 (N.D. Ill. 1984). This was especially appropriate for amended § 6(4), he told the court of appeals, because of the need to establish "an adequate factual record. . . ." (Suppl. Br. at 6.) Similarly, intervenor characterized amended § 6(1) as "substantially different from the old [§ 6(1)]," and amended § 6(4) as "present[ing] different questions than did the old language." (Suppl. Br. at 3, 6.)

By way of contrast, intervenor now asserts that the amended statutes present only questions of law. (Int. Br. 26). Intervenor then asks this Court to review these amended statutes as an original matter, but cites no case in which this Court has evaluated a materially different superseding statute enacted during the pendency of a constitutional challenge. Indeed, in *Fusari v. Steinberg*, 419 U.S. 379 (1975), one of the cases upon which intervenor relies, the Court specifically declined to evaluate the constitutionality of a superseding statute as an original matter.[58]

This is not a case, like each of those cited by intervenor, in which the change of law took place only after the court appealed from had entered judgment. Intervenor spurned a possible opportunity in the court of appeals to seek review of amended §§ 6(1) and 6(4). His change of litigation tactics is no occasion for departing from this Court's well-settled rule that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also Brandon v. Holt*, 105 S. Ct. 873, 879 n.25 (1985).

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[58] There was no discussion of the constitutionality of the superseding statutes in either of intervenor's principal cases, *Brockington v. Rhodes*, 396 U.S. 41 (1969), and *Hall v. Beals*, 396 U.S. 45 (1969). In *Schall v. Martin*, 104 S. Ct. 2403, 2405 n.2 (1984), the Court evaluated the constitutionality of the superseding statute only insofar as it was "identical to [the] former" statute. Finally, the Court in *Allee v. Medrane*, 416 U.S. 802, 818 (1974), pointedly observed that "any challenge to the new provisions presents a different case."

VI. THIS CASE IS NOT MOOT: THE AMENDMENTS TO THE CHALLENGED STATUTE MERELY CONSTITUTE A VOLUNTARY, NON-BINDING, CESSATION OF IMPERMISSIBLE CONDUCT.

The defendant alleging mootness carries a heavy burden of persuasion. *See United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968). Mootness results when, during the pendency of a lawsuit, events occur which make it impossible for a court to render a judgment affecting the rights of the litigants. *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1976). A defendant's voluntary cessation of a challenged practice, however, does not moot the case or deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982) ("Mesquite"). If, as here, abandonment seems timed to anticipate suit, this Court has warned of a special need to be wary of efforts to defeat injunctive relief by protestations of repentance and reform. *United States v. W.T. Grant Co.,* 345 U.S. 629, 632 n.5 (1953).

Intervenor concedes that in cases involving voluntary cessation of illegal conduct, mootness will be found only when "it can be said with assurance" that (1) no reasonable expectation exists that the violation will recur; and (2) the effects of the alleged violation have been completely and irrevocably eradicated. (Int. Br. 27.) *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). *See also Mesquite,* 455 U.S. at 289 n.10. As recognized by the court of appeals, intervenor established neither criterion with respect to either §§ 6(4) or 6(1).

A. The Appeal With Respect To Old § 6(4) Is Not Moot.

1. The latest amendments to § 6(4) evidence a continuing violation of the Constitution.

Intervenor cannot evade the first prong of the *Davis/Mesquite* test for mootness. Amended § 6(4) retains a

pre-viability standard very similar to that held unconstitutional. Repetition of this unconstitional standard is overt evidence of a recurring violation of the Constitution.[59] Intervenor's failure to establish the first prong of the *Mesquite/Davis* standard is sufficient to defeat his mootness argument.[60]

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[59] Intervenor rewrites this history as "a good faith attempt by the legislature to conform its laws to the holdings of this Court." (Int. Br. 28.) To support this characterization, intervenor quotes the court of appeals, out of context, as "acknowledging" that " 'the State has attempted repeatedly to alter the contours of [the Illinois Abortion Law] to reflect the latest judicial pronouncements in the area of abortion and privacy.' " (Int. Br. 27-28, *quoting Charles IV*, 749 F.2d at 458.) In fact, the court of appeals reached a contrary conclusion.

Intimately familiar with the number of amendments and consequent challenges to the Illinois Abortion Law of 1975, the court of appeals stated, in context:

> Like the defendant city in Aladdin's Castle, the State of Illinois could re-enact S.B. 47's version of Section 6(4) if this court dismissed plaintiffs' challenge to that section. Indeed, the very number of amendments made to the challenged statute in the last several years persuades this court that such a result would not be unlikely. Moreover, the history of the Abortion Law suggests that the State has attempted repeatedly to alter the contours of that statute to reflect the latest judicial pronouncements in the area of abortion and privacy. As a result, defendants and intervening defendants have failed to prove to this court that the State will not "return to its old ways" if the court dismisses plaintiffs' claim.

Charles IV, 749 F.2d at 458.

[60] Intervenor offers two bases for concluding that the State is unlikely to re-enact former § 6(1) and § 6(4), neither of which is persuasive. First, intervenor asserts that "the [Illinois] General Assembly, in the context of abortion regulation, has never repealed a challenged provision and subsequently re-enacted that same provision at a later date." (Int. Br. 28). This assertion is incorrect. As noted in the Statement of the Case, *supra*, at p. 3 & n.2, new §§ 2(7) and

(Footnote continued on following page.)

2. **The unconstitutional effects of the old § 6(4) are not eradicated.**

Intervenor also fails to comply with the second requirement of the *Mesquite/Davis* test. The HB 1399 amendments neither correct the constitutional inadequacies of § 6(4) nor eradicate its harmful chilling effects. The old § 6(4) was flawed because the State unconstitutionally attempted to regulate the abortion process, on behalf of the fetus, prior to viability. By merely inserting the word "reasonable" before "possibility," the new § 6(4) continues to impose criminal liability on physicians who fail to act on behalf of a pre-viable fetus, in contravention of prior holdings of this Court. *Colautti*, 439 U.S. 379 (1979).[61]

(Footnote continued from preceding page.)
11(3) are verbatim reenactments of former, challenged §§ 2(10) and 11(d).

Intervenor also contends the enactment of § 6(2) makes it unlikely that the General Assembly would re-enact former §§ 6(1) and 6(4) because "the language of unamended §§ 6(1) and 6(4) is inconsistent with § 6(2)." (Int. Br. 28.) It is by no means clear to what extent former §§ 6(1) and 6(4) would require the presence of a second physician. Accordingly, the very vagueness which is one basis for challenging these provisions makes it impossible to determine whether they are inconsistent with one another.

[61] Despite his claim that HB 1399 rendered this case moot, intervenor never attempted to dismiss the appeal. Instead, intervenor continued to urge the Seventh Circuit to reverse the district court's injunction. Intervenor's continued advocacy is significant. In *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944), the Court declined to treat as moot an action under the Fair Labor Standards Act even after the defendant employer voluntarily had changed its method of paying employees. This Court observed that defendant "has consistently urged the validity of the [old] plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made."

B. **Plaintiff-physicians Remain At Risk Under unamended § 6(1).**

Section 6(1), no less than § 6(4), has been subject to continuous amendment by the General Assembly in response to successful constitutional challenges. Intervenor thus cannot satisfy the first prong of the *Mesquite/Davis* test. The live nature of the constitutional controversy surrounding § 6(1) provided, however, an additional reason for the court of appeals to reach the merits. Old § 6(1) remained in effect from October 14, 1983, until June 30, 1984, the day HB 1399 was enacted. Violation of the old § 6(1) was a Class 2 felony if the death of a fetus occurred as a result of a post-viability abortion. Ill. Rev. Stat. ch. 38, ¶ 81-26(1) (1983). The relevant statute of limitations, Ill. Rev. Stat. ch. 38, ¶ 3-5(b) (1983), allows the State a period of three years within which to commence prosecution.[62] As noted by the court of appeals, this risk of prosecution was "insufficiently speculative" to render moot the appeal on § 6(1). *Charles IV*, 749 F.2d at 457.[63]

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[62] Intervenor relies on this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), in an attempt to shift the burden to appellees to prove that the risk of prosecution is both " 'real and 'immediate.' " (Int. Br. 29, *quoting Lyons, supra*, 461 U.S. at 102.) *Lyons* is wholly inapposite. *Lyons* set forth the burden of proof on the Article III "case or controversy" requirement, not mootness. As noted, *supra* at 46, the burden of proving the "eradication of past effects" prong of mootness rests squarely and heavily with the proponent of mootness.

[63] Intervenor's representation that no one was prosecuted under § 6(1) and that no prosecutions presently are pending must be received with skepticism. Intervenor cites no support for this claim and does not represent the defendant class of State's Attorneys who are charged with the enforcement of this statute throughout Illinois' 102 counties.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Seventh Circuit. In the alternative, this Court should dismiss intervenor's appeal for lack of a justiciable case or controversy under Article III.

Respectfully submitted,

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** Appellees wish to acknowledge the assistance of Brett Rappaport, a law student at John Marshall School of Law, in the preparation of this brief.

Dated: September 6, 1985

SUPPLEMENTAL APPENDIX

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

ALLAN G. CHARLES, M.D., MARVIN ROSNER, M.D., DAVID ZBARAZ, M.D., and MARTIN MOTEW, M.D., and on behalf of all other similarly situated,

Plaintiffs,

v.

BERNARD CAREY, State's Attorney for the County of Cook, WILLIAM J. SCOTT, Attorney General of the State of Illinois, their agents, successors, and all others similarly situated, and BYRON FRANCIS, M.D., Acting Director of Public Health, State of Illinois,

Defendants.

79 C 4541

THE HOPE CLINIC FOR WOMEN, LTD., an Illinois corporation, HECTOR N. ZEVALLOS, M.D., NATIONAL HEALTH CARE SERVICES OF PEORIA, INC., an Illinois corporation, ARTHUR C. WATSON, JR., M.D., and ROBERT C. STEPTOE, M.D.,

Plaintiffs,

v.

WILLIAM J. SCOTT, Attorney General of the State of Illinois, and BERNARD CAREY, State's Attorney of Cook County, Illinois,

Defendants.

79 C 4548

MOTION TO INTERVENE AND PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM

NOW COME Eugene F. Diamond, M.D., Jasper F. Williams, M.D., and Mr. David J. Campbell, pursuant to Federal

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Rules of Civil Procedure 24 and 17, to move this Court, Judge Joel M. Flaum presiding, to intervene and for appointment of guardian ad litem in this named action to defend rights and interests acknowledged by the Illinois "Abortion Law of 1975," as amended by Illinois Senate Bill 47 (the "Law").

1. In support of his Motion and Petition, Dr. Eugene F. Diamond states unto this Court as follows:

a) Dr. Diamond is a board-certified pediatrician registered and liscensed as a physician and surgeon in the State of Illinois. He is Professor of Pediatric Medicine at Stritch School of Medicine; he practices at 11055 S. St. Louis, Chicago, Illinois; he resides in Palos Park, Illinois. *See* affidavit here attached as Exhibit A; *curriculum vitae* here attached as Exhibit B.

b) In the usual and customary practice of his profession, Dr. Diamond cares for children recently born; at present he supervises the care of ten such infants. Dr. Diamond was appointed guardian *ad litem* for infants who survive abortion in *Wynn v. Scott*, 449 F.Supp. 1302 (N.D. Ill., three judge court, 1978), *aff'd sub nom., Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979), ("*Wynn I*"), prior litigation concerning the unamended "Illinois Abortion Law of 1975," Ill. Rev. Stat. ch. 38 § 81-21 *et seq.* (1977).

c) Dr. Diamond is the parent of an unemancipated minor daughter of childbearing age. As Dr. Diamond here proposes, he likewise intervened in *Wynn I* and in *Wynn v. Scott,* 448 F.Supp. 997 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey,* 582 F.2d 1375 (7th Cir. 1978), ("*Wynn II*"), to support the claims, interests and defenses acknowledged on behalf of parents of minors by the "Illinois Abortion Law of 1975," unamended, and the "Illinois Parental Consent to Abortion Law of 1977" [Ill. Rev. Stat. ch.38 § 81-51 *et seq.*

(1977 Supp.)], and to defend his fundamental rights and interests as a parent to nurture, care for and guide his minor daughter. See *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Ginsberg v. New York,* 390 U.S. 629 (1968); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). In addition to *Wynn I* and *Wynn II,* parents have elsewhere intervened in abortion cases to defend their interests and the interests of their minor daughters. *Bellotti v. Baird,* 393 F.Supp. 847 (D. Mass. 1975); *Planned Parenthood of Memphis v. Blanton,* C-78-2310 (D.W. Tenn., filed June 29, 1978); *Women's Community Health Center v. Cohen,* Civ. No. 79-1628 (D. Maine, filed July 31, 1979); *Akron Center for Reproductive Health, Inc.* v. City of Akron, Civ. Action C78-155A (N.D. Ohio, opinion filed Aug. 22, 1979); *Womens Services v. Thone,* CV79-L-85 (D. Neb., order filed April 20, 1979). As father to his daughter, Dr. Diamond acts and maintains an interest in her welfare should she consider or elect to procure an abortion.

d) Dr. Diamond conscientiously objects to performing or assisting in the performance of abortion. He has intervened in litigation to protect his professional interest in statutory restrictions on abortion. See *Zbaraz v. Quern,* No. 77 C 4522 (N.D. Ill., filed Dec. 21, 1977), (order granting preliminary injunction), rev'd, 572 F.2d 582 (7th Cir. 1978); *Zbaraz v. Quern,* 469 F.Supp. 1212 (N.D. Ill. 1979), *appeal docketed;* No. 79-64 (U.S. Sup. Ct. July 13, 1979); *stay denied, Williams v. Zbaraz,* 99 S. Ct. 2095 (1979).

e) Dr. Diamond moves to intervene as a party defendant in this action as a parent of an unemancipated minor daughter of childbearing age, and asserts the follow-

ing interests, claims, and defenses acknowledged by the Law:

i) § 1 acknowledges an interest of the parent of unemancipated minor daughters of childbearing age, in maternal health, and in the integrity of the maternal decision-making process;

ii) § 3.3 provides that the parent be notified and have the opportunity to consult on an informed basis with his minor unemancipated daughter prior to performance of abortion upon her;

iii) § 3.1 assures that abortion would be performed by a physician and that the minor would have an opportunity to privately consult with her physician prior to performance;

iv) §§ 3.2, 3.5, 6(6), 11(c) and 11(d) assure that certain information essential to the minor's decision-making processes should be made available, that a reasonable period of time to consider such information is to be provided, and that the minor should be secure from coercion and undue influence to procure abortion, thereby protecting and assuring the fundamental right to decide whether or *not* to terminate pregnancy, *Roe v. Wade*, 410 U.S. 113, 153 (1973); and

v) §§ 5, 9, 11(f) and 12 protect an interest in preserving maternal life and health by providing that abortions should be performed in hospitals after the first trimester of pregnancy, by limiting the use of saline amniocentesis, by proscribing unnecessary surgery, and by requiring that the minor be informed of subsequent complications.

f) Dr. Diamond petitions this Court to appoint him guardian ad litem for infants who survive abortion in

order to defend the following rights and interests acknowledged on their behalf by the Law:

i) § 1 recognized the infant's interest in life and health;

ii) § 4 provides for life support should an infant survive abortion;

iii) § 6 in its various parts and § 12 provide standards of care for an infant who survives an abortion and for enforcement of such standards; and

iv) §§ 7 and 8 provide judicial standards and procedures to assure that the best interests of infants who survive abortion will be served.

g) Dr. Diamond moves this Court to intervene as a party defendant in this named action on behalf of himself as a practicing physician, and asserts the following professional interests, claims, and defenses acknowledged by the Law:

i) § 13 provides that Dr. Diamond, who conscientiously objects to performing or assisting in abortion, cannot be held criminally, professionally, administratively, or civilly liable for failure to perform or assist in abortion;

ii) §§ 11(a) designates that the requirements of the Law should be the standards for professional conduct relating to abortion; Dr. Diamond agrees that the requirements set forth by the Law are appropriate to the medical profession, and asserts an interest in the entire law to uphold standards appropriate to the medical profession and his specialty; and

iii) To the extent that the operative effect of the Law in its entirety and through each of its provisions

would permit or encourage fewer abortions to be performed, as the plaintiffs allege it would, *e.g.* Charles Complaint at para. 26, Dr. Diamond, maintains a fiscal interest in the outcome of this litigation since he would receive consideration for his services rendered to such children who are not aborted and become his actual or potential patients upon live birth.

2. In support of his Motion and Petition, Dr. Jasper F. Williams states unto this Court as follows:

a) Dr. Williams is a board certified obstetrician and gynecologist licensed as a physician and surgeon in the State of Illinois. He is past president of the National Medical Association. He practices at 408 E. Marquette, Chicago, Illinois; he resides in Chicago, Illinois. *See* affidavit here attached as Exhibit C; *curriculum vitae* here attached as Exhibit D.

b) In the usual and customary course of his practice, Dr. Williams treats the human being *in utero* as an individual patient, which is the usual and customary practice of the medical profession. *See* J.P. GREENHILL & E.A. FRIEDMAN, BIOLOGICAL PRINCIPLES AND THE MODERN PRACTICE OF OBSTETRICS 2-4 (1974); TEN TEACHERS UNDER THE DIRECTION OF STANLEY G. CLAYTON, *Ante-Natal Care,* in OBSTETRICS (11 ed. 1966); K.R. NISWANDER, Preface, in OBSTETRICS; ESSENTIALS OF CLINICAL PRACTICE (1st ed. 1976); A. LILEY, The Foetus in Control of His Environment, in ABORTION AND SOCIAL JUSTICE (1973). Dr. Williams presently supervises the care and treatment of approximately 125 such patients. It is well established that physicians may assert the rights and interests of their patients where such rights or interests might not otherwise be as-

serted. *Singleton v. Wulff,* 428 U.S. 106 (1976); *Friendship Medical Center v. Chicago Board of Health,* 505 F. 2d 1141 (7th Cir. 1974); *Wynn v. Scott,* 449 F.Supp. 1302 (N.D. Ill., three judge court, 1978). Guardians have been appointed to defend the interests of unborn children in federal courts during the course of abortion-related litigation, including *Wynn I,* prior litigation concerning the "Illinois Abortion Law of 1975," unamended. See *Wynn v. Scott,* 449 F.Supp. 1302 (N.D. Ill., three judge court, 1976); *Doe v. Scott,* 321 F.Supp. 1385 (N.D. Ill., three judge court, 1971); *McRae v. Mathews,* 421 F.Supp. 533 (E.D. N.Y. 1976); *Klein v. Nassau County Medical Center,* 347 F.Supp. 496 (E.D. N.Y. 1972); *Planned Parenthood of Memphis v. Blanton,* C-78-2310 (D. W. Tenn., filed June 29, 1978). *See also* Wright & Miller, 6 *Federal Practice and Procedure* 776 (West 1971); *Hatch v. Riggs National Bank,* 361 F.2d 559 (D.C. Cir. 1966); *Hatch v. Riggs National Bank,* 284 F.Supp. 396 (D. D.C. 1968); *Doe v. Doe,* 314 N.E.2d 128 (Mass. S.J.C. 1974).

c) Dr. Williams conscientiously objects to performing or assisting in the performance of abortion. He has intervened in litigation to protect his professional interest in statutory restrictions on abortion. *Zbaraz v. Quern,* No. 77 C 4522 (N.D. Ill., filed Dec. 21, 1977) (order granting preliminary injunction), *rev'd,* 572 F.2d 582 (7th Cir. 1978); *Zbaraz v. Quern,* 469 F.Supp. 1212 (N.D. Ill. 1979) *appeal docketed,* No. 79-64 (U.S. Sup. Ct. July 13, 1979), *stay denied, Williams v. Zbaraz,* 99 S.Ct. 2095 (1979).

d) Dr. Williams moves to intervene as party defendant in this named action to defend the rights and interests of his prenatal patients, or, in the alternative, petitions this court to appoint him guardian ad litem for unborn

children in this named action, and asserts the following interests, claims and defenses acknowledged on their behalf by the law:

1) § 1 acknowledges a fetal interest in continued existence; and

ii) §§ 5 and 6 assure that the fetus will not be aborted or placed at risk except under certain circumstances and under certain conditions.

e) Dr. Williams moves this Court to intervene as a party defendant in this named action on behalf of himself as a practicing physician, and asserts the following interests, claims and defenses acknowledged by the Law:

i) § 13 provides that Dr. Williams, who does not perform or assist in abortions based upon his conscientious objection to this practice, cannot be held criminally, professionally, administratively, or civilly liable for failure to perform or assist in the performance of abortion;

ii) § 11(a) designates that the requirements of the Law are the standards for professional conduct relating to abortion; Dr. Williams agrees that the requirements of the Law are appropriate to his profession, and asserts an interest in the entire Law to uphold standards appropriate to his profession and speciality;

(iii) To the extent that the operative effect of the Law in its entirety and through each of its provisions would permit or encourage fewer of actual and potential female patients to abort their actual and potential patients *in utero*, as the plaintiffs allege it would, *e.g.* Charles Complaint at para. 26, Dr. Williams maintains a fiscal interest in the outcome of this litigation since he does not perform abortion, but receives consideration for services relating to care of female patients and patients *in*

utero during pregnancy and upon normal delivery; and

iv) § 10 and those sections of the Law under which § 10 is operative, and §§ 11(b) and 11(e), which require that certain information be reported to the State then made available to researchers in statistical form, would assist Dr. Williams in the practice of his profession by providing data upon which he could base medical judgments and offer professional advice to benefit patients, and which would form standards for practice of the medical profession and Dr. Williams' specialty.

3. In support of his Motion, Mr. Campbell states unto this Court as follows:

a) Mr. Campbell attends Garrett Evangelical-Theological Seminary of Northwestern University, Evanston, Illinois, where he is a candidate for a degree of Master of Divinity in preparation for ministry in the United Methodist Church. He resides with his wife in Evanston, Illinois. *See* affidavit here attached as Exhibit E.

b) Mr. Campbell is married; his marriage is not subject to a decree of separate maintenance. As Mr. Campbell here proposes, a spouse likewise intervened in *Wynn I* to support interests, claims, and defenses acknowledged by the "Illinois Abortion Law of 1975," unamended, and to defend fundamental procreative and associational rights which attach to the marital relation. *Loving v. Virginia,* 388 U.S. 1 (1967); *Estin v. Estin,* 134 U.S. 541 (1948); *Skinner v. State of Oklahoma,* 316 U.S. 535 (1942); *Maynard v. Hill,* 125 U.S. 190 (1888).

c) Mr. Campbell moves to intervene as a party defendant in this named action as a spouse of a woman of

childbearing age, and asserts the following interests, claims and defenses acknowledged by the Law:

i) § 1 acknowledges spousal and paternal interests in children conceived of marriage; and

ii) §§ 3.3 provides that the husband is to be notified and have an opportunity to consult on an informed basis with the wife prior to performance of abortion upon her.

4. Pursuant to Federal Rule of Civil Procedure 24(a)(2), Dr. Diamond, Dr. Williams, and Mr. Campbell possess interests relating to the subject matter of this litigation. Adverse disposition of this case would, as a practical matter, impede and impair their ability to protect private rights and interests acknowledged on their behalf by the Law. Their interests are not adequately represented by the present parties to this action: they assert private rights and interests independent from the interests of the State; moreover, one of the named defendants has clearly opposed this legislation (see Exhibits F and G, here attached).

5. Pursuant to Fed. R. Civ. P. 24(b)(2), Dr. Diamond, Dr. Williams and Mr. Campbell claim numerous questions of law and fact in common with the main subject matter of this action. Their application is timely and they warrant that their participation in this litigation will not unduly delay or prejudice the original parties. Their Motion includes and is accompanied by pleadings setting forth claims and defenses.

6. The applicants will be jointly represented by the same counsel; all briefs and pleadings will be jointly filed. Therefore, their intervention would be consistent with the need for judicial economy.

WHEREFORE, Dr. Diamond prays this Court to permit him to intervene and to participate as party defendant in this action in the following capacities:

1. As parent of a minor unemancipated daughter of childbearing age;

2. As guardian ad litem for infants who survive abortions; and

3. As a practicing physician with professional interests at stake in the outcome of this litigation.

Dr. Williams prays this Court to permit him to intervene and to participate as party defendant in this action in the following capacities:

1. As a physician asserting the rights and interests of his prenatal patients, or, in the alternative, as guardian ad litem for unborn children subject to abortion; and

2. As a practicing physician with professional interests at stake in the outcome of this litigation.

Mr. Campbell prays this Court to permit him to intervene and to participate in this action as a party defendant as the spouse of a woman of childbearing age.

Respectfully submitted,

EUGENE F. DIAMOND, M.D.
JASPER F. WILLIAMS, M.D.
DAVID K. CAMPBELL

By:_____

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ABORTIONS

PUBLIC ACT 83-1128

HOUSE BILL 1399

AN ACT in relation to abortions and amending certain Acts herein named.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 2, 3.1, 5, 6, 10, 11, 12 and 14 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended, are amended to read as follows:

(Ch. 38, par. 81-22) [S.H.A. ch. 38, ¶ 81-22]

Sec. 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this Law shall be given the meaning ascribed to them:

~~(1) "First trimester" means the first twelve weeks of gestation commencing with ovulation rather than computed on the basis of the menstrual cycle.~~

(1) ~~(2)~~ "Viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support.

(2) ~~(3)~~ "Physician" means any person licensed to practice medicine in all its branches under the Illinois "Medical Practice Act", approved June 30, 1923, as amended.[1]

Additions in text are indicated by underline; deletions by ~~strikeouts~~

[1] Chapter 111, ¶ 4401 et seq.

~~(4) "Hospital" means a hospital licensed pursuant to the Illinois "Hospital Licensing Act", approved July 1, 1953, as amended.~~

(3) ~~(5)~~ "Department" means the Department of Public Health, State of Illinois.

(4) ~~(6)~~ "Abortion" means the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus ~~intent to cause fetal death~~.

(5) ~~(7)~~ "Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell ~~vitelline~~ membrane of the ovum.

~~(8) "Human being" means the individual from fertilization until death.~~

(6) ~~(9)~~ "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens ~~a human being~~ from fertilization until live birth.

(7) (10) "Abortifacient" means any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.

(8) "Born alive", "live born", and "live birth", when applied to an individual organism of the species homo sapiens, each mean he or she was completely expelled or extracted from his or her mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, irrespective of the duration of pregnancy and whether or not the umbilical cord has been cut or the placenta is attached.

(Ch. 38, par. 81-23.1) [S.H.A., ch. 38, ¶ 81-23.1]

Sec. 3.1. ~~(A)~~ Medical Judgment. No abortion shall be performed except by a physician after either (a) he determines that, in his best clinical judgment, the abortion is necessary, or (b) he receives a written statement or oral communication by another physician, hereinafter called the "referring physician", certifying that in the referring physician's best clinical judgment the abortion is necessary. Any person who intentionally or knowingly performs an abortion contrary to the requirements of Section 3.1 ~~this paragraph (A)~~ commits a Class 2 felony.

~~(B) Medical Consultation.~~

~~(1) No abortion shall be performed except in compliance with regulations which the Department shall issue to assure.~~

~~(a) That, before the abortion is performed, the woman upon whom the abortion is to be performed will have a private medical consultation with the physician who is to perform the abortion, that the consultation will be in a place, at a time and of a duration reasonably sufficient to enable the physician to determine whether, based upon his best clinical judgment, the abortion is necessary, and~~

~~(b) That the physician who is to perform the abortion will describe the basis of his best clinical judgment that the abortion is necessary on a form prescribed by the Department as required by Section 10 of this Law.~~

~~(2) Exception. Subsection (B) (1) (a) of Section 3.1 shall not apply when, in the medical judgment of the attending physician based on the particular facts of the case before him, there exists a medical emergency in such a case, the physician shall describe the basis of his medical judgment that such an emergency exists on a form prescribed by the Department as required by Section 10 of this Law.~~

~~(3) Penalty. Any person who intentionally, knowingly, or recklessly violates the requirements of paragraph (B)(1) or~~

~~paragraph (B) (2) of Section 3.1, or regulations promulgated thereunder, commits a Class A misdemeanor.~~

(Ch. 38, par. 81-25) [S.H.A. ch. 38, ¶ 81-25]

Sec. 5. (1) No abortion not necessary to preserve the life ~~or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable on a form prescribed by the Department under Section 10 of this Law.~~

(1) ~~(2)~~ When the fetus is viable no abortion shall be performed unless in the medical judgment of the attending or referring physician, based on the particular facts of the case before him, it is ~~medically~~ necessary to preserve the life or health of the mother. Intentional, knowing, or reckless failure to conform to the requirements of subsection paragraph (1) ~~(2)~~ of Section 5 is a Class 2 felony.

(2) ~~(3)~~ When the fetus is viable the physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Law, the medical indications which, in his medical judgment based on the particular facts of the case before him, warrant performance of the abortion to preserve the life or health of the mother.

(Ch. 38, par. 81-26) [S.H.A. ch. 38, ¶ 81-26]

Sec. 6. (1) (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act[1], the

[1] Paragraph 81-30 of this chapter.

available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(1)(a) commits a Class 3 felony.

(2) (a) No abortion shall be performed or induced when the fetus is viable unless there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for any child born alive as a result of the abortion. This requirement shall not apply when, in the medical judgment of the physician performing or inducing the abortion based on the particular facts of the case before him, there exists a medical emergency; in such a case, the physician shall describe the basis of this judgment on the form prescribed by Section 10 of this Act. Any physician who intentionally performs or induces such an abortion and who intentionally, knowingly, or recklessly fails to arrange for the attendance of such a second physician in violation of Section 6(2)(a) commits a Class 3 felony.

(b) Subsequent to the abortion, if a child is born alive, the physician required by Section 6(2)(a) to be in attendance shall exercise the same degree of professional skill, care and diligence to preserve the life and health of the child as would be required of a physician providing immediate medical care to a child born alive in the course of a pregnancy termination which was not an abortion. Any such physician who intentionally, knowingly, or recklessly violates Section 6(2)(b) commits a Class 3 felony. ~~No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to~~

~~encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure~~.

(3) ~~(2)~~ The law of this State shall not be construed to imply that any living individual organism of the species homo sapiens who has been born ~~human being aborted~~ alive is not an individual under the "Criminal Code of 1961," approved July 28, 1961, as amended.[2]

~~(3) No person shall use or sell any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive. Any person who shall use or sell a fetus in violation of this Section, even a fetus aborted to protect or preserve the life and health of the mother, is guilty of a Class 1 felony. Nothing in this Law shall prohibit the use or sale of any tissues or cells obtained from a dead fetus or dead premature infant whose death did not result from an induced abortion for use in therapeutic or scientific research, provided that written consent for such use or sale is obtained from one of the parents of such an infant or fetus. Intentional, knowing or reckless failure of any person to obtain such consent for such use or sale is a Class A misdemeanor~~.

~~(4) No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of~~

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[2] Paragraph 1-1 et seq. of this chapter.

~~the mother, with or without artificial support. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such failure~~.

(4) (a) Any physician who intentionally performs an abortion when, in his medical judgment based on the particular facts of the case before him, there is a reasonable possibility of sustained survival of the fetus outside the womb, with or without artificial support, shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus.

(b) The physician shall certify in writing, on a form prescribed by the Department under Section 10 of this Act, the available methods considered and the reasons for choosing the method employed.

(c) Any physician who intentionally, knowingly, or recklessly violates the provisions of Section 6(4) (a) commits a Class 3 felony.

(5) Nothing in Section 6 requires a physician ~~or any other person~~ to employ a method of abortion ~~any measures to encourage or sustain the life of the fetus during the course of a pregnancy termination~~ which, in the medical judgment of the physician performing the abortion ~~pregnancy termination~~ based on the particular facts of the case before him, would increase medical risk to the mother.

(6) When the fetus is viable and when there exists reasonable medical certainty (a) that the particular method of abortion to be employed will cause organic pain to the fetus, and (b) ~~there exists reasonable medical certainty~~ that use of an anesthetic or analgesic ~~which the physician knows to be available~~ would abolish or alleviate organic pain to the fetus caused by the particular method of abortion to be employed, then the

physician who is to perform the abortion or his agent or the referring physician or his agent shall inform the woman upon whom the abortion is to be performed that such an anesthetic or analgesic is available, if he knows it to be available, for use to abolish or alleviate organic pain caused to the fetus by the particular method of abortion to be employed. Any person who performs an abortion with knowledge that any such reasonable medical certainty exists and that such an anesthetic or analgesic is available, ~~or with reckless disregard as to whether any such reasonable medical certainty exists,~~ and intentionally fails to so inform the woman or to ascertain that the woman has been so informed commits a Class B misdemeanor. The foregoing requirements of subsection Paragraph (6) of Section 6 shall not apply (a) when, in the medical judgment of the physician who is to perform the abortion or the referring physician based upon the particular facts of the case before him: (i), there exists a medical emergency, or (ii) the administration of such an anesthetic or analgesic would decrease a known possibility of sustained survival of the fetus apart from the body of the mother, with or without artificial support, or (b) ~~Paragraph (6) of Sectio shall not apply~~ when the physician who is to perform the ab on administers an anesthetic or an analgesic to the woman or the fetus ~~to abolish or alleviate pain caused to her by the particular method of abortion employed~~ and he knows there exists reasonable medical certainty that such use will abolish organic pain caused to the fetus during the course of the abortion.

(7) Any person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children, approved May 17, 1877, as amended,[3] except, that nothing in that Section shall be construed to attach

[3] Chapter 23, ¶ 2354.

any penalty to participation in the performance of a lawful pregnancy termination.

(8) No person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus. Nothing in Section 6(8) shall be construed to proscribe the performance of an abortion on account of the sex of the fetus because of a genetic disorder linked to that sex. If the application of Section 6(8) to the period of pregnancy prior to viability is held invalid, then such invalidity shall not affect its application to the period of pregnancy subsequent to viability.

(Ch. 38, par. 81-30) [S.H.A. ch. 38, ¶ 81-30]

Sec. 10. A report of each abortion performed shall be made to the Department on forms prescribed by it. Such report forms shall not identify the patient by name, but by an individual number to be noted in the patient's permanent record, in the possession of the physician, and shall include information concerning:

(1) ~~(a)~~ Identification of the physician who performed the abortion and the facility where the abortion was performed and a patient identification number;

(2) ~~(b)~~ State~~, county and municipality~~ in which the patient resides;

(3) ~~(c)~~ Patient's date of birth, race and marital status;

(4) ~~(d)~~ Number of prior pregnancies;

(5) ~~(e)~~ Date of last menstrual period;

(6) ~~(f)~~ Type of abortion procedure performed;

(7) ~~(g)~~ Complications and whether the abortion resulted in a live birth;

(8) ~~(h)~~ The date the abortion was performed;

(9) ~~(i)~~ Medical ~~Certification that the fetus was not viable or medical~~ indications for any abortion performed when the fetus was viable;

(10) The information required by Sections 6(1)(b) and 6(4)(b) of this Act,[1] if applicable;

~~(j) Medical indications for the use of saline amniocentesis;~~

~~(k) Medical indications for the nullification of any waiting period required under this law;~~

(11) ~~(l)~~ Basis for any medical judgment that a medical emergency existed when as required under Sections 6(2)(a) and 6(6) and when required to be reported in accordance with this Section by any provision ~~Sections 3.1, 3.2, 3.3 or 3.4~~ of this Law; and

(12) The pathologist's test results pursuant to Section 12 of this Act.[2]

~~(m) The basis for the clinical judgment that an abortion is necessary;~~

~~(n) The date of the medical consultation required by paragraph (B) of 3.1, the time it began and the time it ended, and~~

~~(o) The results of a pregnancy test performed on the woman prior to the abortion and the pathologist's test results pursuant to Section 12 of this Act.~~

Such form~~, designated the "Original Report,"~~ shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion or pregnancy termination, and transmitted to the Department not later than 10 days following the end of the month in which the abortion was performed. ~~Attached to each such form transmitted to the~~

[1] Paragraph 81-26 of this chapter.

[2] Paragraph 81-32 of this chapter.

~~Department shall be a completed form designated the "Redacted Copy" which shall be identical in all particulars to the "Original Report" except that the patient identification number, the material required by paragraph (a) of Section 10, and the physician's name shall be omitted~~.

In the event that a complication of an abortion occurs or becomes known after submission of such form, a correction using the same patient identification number shall be submitted to the Department within 10 days of its becoming known.

The Department may prescribe rules and regulations regarding the administration of this Law and shall prescribe regulations to secure the confidentiality of the woman's identity in the information to be provided under the "Vital Records Act".[3] ~~in a manner which accords with the policy described in the following paragraph.~~

~~All information obtained by a physician, hospital or ambulatory health facility from a patient for the purpose of preparing reports to the Department under this Section shall be available to the Department for inspection in its capacity as a regulatory agency and for statistical and informational purposes in its capacity as a public service agency but shall not be disclosed publicly in such manner as to identify individual patients, except that the Department may disclose any information to another State agency required or authorized to conduct investigations of professional or business practices in hospital, ambulatory surgical treatment center, or other facility. State agencies conducting such investigations shall not disclose individual patient information publicly.~~ All reports received by the Department shall be treated as confidential and the Department shall secure the woman's anonymity. Such reports and shall be used only for statistical purposes. ~~except to the extent necessary to secure the rights or interests of a person or the~~

[3] Chapter 111½ ¶ 73-1 et seq.

~~State pursuant to a court order in civil or criminal actions or proceedings to grant or revoke licenses. However, after each Redacted Copy has been compared to the Original Report by the Department to ensure its accuracy, all Redacted Copies shall be made available by the Department to the public for inspection and reproduction during normal business hours at its principal office.~~

Upon 30 days public notice, the Department is empowered to require reporting of any additional information which, in the sound discretion of the Department, is necessary to develop statistical data relating to the protection of maternal or fetal life or health, or is necessary to enforce the provisions of this Law, or is necessary to develop useful criteria for medical decisions. The Department shall annually report to the General Assembly all statistical data gathered under this Law~~;~~ and its recommendations to further the purpose of this Law~~, and its recommendations to further the interest of this State in assuring the integrity of the woman's decision and in protecting the life and health of women, infants and unborn children through the course of childbearing and birth.~~

The requirement for reporting to the General Assembly shall be satisfied by filing copies of the report with the Speaker, the Minority Leader and the Clerk of the House of Representatives and the President, the Minority Leader and the Secretary of the Senate and the Legislative Council, as required by Section 3.1 of "An Act to revise the law in relation to the General Assembly", approved February 25, 1874, as amended,[4] and filing such additional copies with the State Government Report Distribution Center for the General Assembly as is required under paragraph (t) of Section 7 of the State Library Act.[5]

(Ch. 38, par. 81-31) [S.H.A. ch. 38, ¶ 81-31]

Sec. 11. (1) ~~(a)~~ Any person who intentionally violates any provision of this Law commits a Class A misdemeanor unless a

[4] Chapter 63, ¶ 3.1.

[5] Chapter 128, ¶ 107.

specific penalty is otherwise provided. Any person who intentionally falsifies any writing required by this Law commits a Class A misdemeanor.

Intentional, knowing, reckless, or negligent violations of this Law shall constitute unprofessional conduct which causes public harm under Section 16 of the "Medical Practice Act", approved June 30, 1923, as amended;[1] Section 15 of the "Illinois Nursing Act", approved June 14, 1951, as amended,[2] and Section 11 of the "Physician's Assistants Practice Act", approved September 11, 1975, as amended.[3]

Intentional, knowing, reckless or negligent violations of this Law will constitute grounds for refusal, denial, revocation, suspension, or withdrawal of license, certificate, or permit under Section 7.6 of the "Pharmacy Practice Act", approved July 11, 1955, as amended;[4] Section 7 of the "Ambulatory Surgical Treatment Center Act", effective July 19, 1973, as amended;[5] and Section 7 of the "Hospital Licensing Act", approved July 1, 1953, as amended.[6]

(2) ~~(b)~~ Any hospital or licensed facility which, or any physician who intentionally, knowingly, or recklessly fails to submit a complete report to the Department in accordance with the provisions of Section 10[7] of this Law and any person who intentionally, knowingly, recklessly or negligently fails to maintain the confidentiality of any ~~original~~ reports required under this Law or reports required by Sections 10.1 or 12[8] ~~paragraph (c) of Section 11~~ of this Law commits a Class B misdemeanor.

~~(c) Any person, firm, corporation, association, agency, institution, or other legal entity which solicits, offers or receives~~

[1] Chapter 111, ¶ 4433.
[2] Chapter 111, ¶ 3420.
[3] Chapter 111, ¶ 4762.
[4] Chapter 111½, ¶ 4019.
[5] Chapter 111½, ¶ 157-8.7.
[6] Chapter 111½, ¶ 148.
[7] Paragraph 81-30 of this chapter.
[8] Paragraphs 81-30.1 or 81-32 of this chapter.

~~any kickbacks or bribes in connection with the performance of an abortion or which solicits, offers or receives a rebate or a fee for referring an individual to another person for the providing of an abortion commits a Class A misdemeanor.~~

(3) ~~(d)~~ Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

~~(e) Any physician who diagnoses a woman as having complications resulting from an abortion shall report the patient's name, the diagnosis and a summary of her physical symptoms to the Department. If the physician making the diagnosis of a complication knows the identity of the physician who performed the abortion or the name or location of the facility where it was performed, he shall also report such information to the Department. Any physician who intentionally or knowingly violates paragraph (e) of Section 11 commits a Class C misdemeanor.~~

(4) ~~(f)~~ Any person who intentionally, knowingly or recklessly performs upon a woman what he represents to that woman to be an abortion when he knows or should know that she ~~procedure upon a woman who~~ is not pregnant commits a Class 2 felony and shall be answerable in civil damages equal to 3 times the amount of proved damages.

(Ch. 38, par. 81-32) [S.H.A. ch. 38, ¶ 81-32]

Sec. 12. The dead fetus and all tissue removed at the time of abortion shall be submitted for a gross and microscopic analysis and tissue report to a board eligible or certified

pathologist as a matter of record in all cases. The results of the analysis and report shall be given to the physician who performed the abortion within 7 days of the abortion and such physician shall report any complications relevant to the woman's medical condition to his patient within 48 hours of receiving a report if possible. ~~There shall be no exploitation of or experimentation with the aborted fetus or tissue.~~ Any evidence of live birth or of viability shall be reported within 7 days, if possible, ~~immediately~~ to the Department by the pathologist. Intentional failure of the pathologist to report any evidence of live birth or of viability to the Department is a Class B misdemeanor ~~2 felony~~.

(Ch. 38, par. 81-34) [S.H.A. ch. 38, ¶ 81-34]

Sec. 14. (1) If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

(2) ~~Distribution of the printed information prescribed by Section 3.5 of this Law shall not be required by any part of this Law until the Department publishes notice that such materials are initially available.~~ Within 60 days from the time this Section becomes law, the Department shall issue regulations ~~pursuant to paragraph (B) of Section 3.1 and~~ pursuant to Section 10,~~,[1] insofar as Section 10 requires regulations relating to registration under the "Vital Records Act". Neither paragraph (B) of Section 3.1 nor Section 10,~~ Insofar as Section 10 requires registration under the "Vital Records Act",[2] it shall not take effect until such regulations are issued. The Department

[1] Paragraph 81-30 of this chapter.

[2] Chapter 111½, ¶ 73-1 et seq.

shall make available the forms required under Section 10 within 30 days of the time this Section becomes law. No requirement that any person report information to the Department shall become effective until the Department has made available the forms required under Section 10. All other provisions of this amended Law shall take effect immediately upon enactment.

(Ch. 38, rep. pars. 81-23.2, 81-23.4, 81-23.5, 81-24, 81-27, 81-28, 81-29, 81-31.2 and 81-31.3) [S.H.A. ch. 38, ¶¶ 81-23.2, 81-23.4, 81-23.5, 82-24, 81-27, 81-28, 81-29, 81-31.2, 81-31.3 repealed]

Section 2. Sections 3.2, 3.4, 3.5, 4, 7, 8, 9, 11.2 and 11.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended, are repealed.

Section 3. Sections 5 and 6 of the "Parental Notice of Abortion Act of 1983", veto overridden November 2, 1983, are amended and Section 8.1 is added thereto, the added and amended Sections to read as follows:

(Ch. 38, par. 81-65) [S.H.A. ch. 38, ¶ 81-65]

Sec. 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent. These proceedings shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of

application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act[1] requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

(Ch. 38, par. 81-66) [S.H.A. ch. 38, ¶ 81-66]

Sec. 6. Medical emergency exception. The requirements of Section 4 of this Act[1] shall not apply when, in the best medical judgment of a ~~the~~ physician based on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason

[1] Paragraph 81-64 of this chapter.

[1] Paragraph 81-64 of this chapter.

of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis for any medical judgment that warrants failure to give notice pursuant to this Act shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. Dissemination of ~~an original and a redacted copy of~~ this report shall comply with the reporting and confidentiality requirements of Section 10 of the Illinois Abortion Law of 1975.[2]

(Ch. 38, new par. 81-68.1) [S.H.A. ch. 38, ¶ 81-68.1]

Sec. 8.1. If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

Sec. 4. This Act takes effect upon becoming a law.

[S.H.A. ch. 38, ¶ 81-22 note]

VETO OVERRIDDEN: June 30, 1984

EFFECTIVE: June 30, 1984

[2] Paragraph 81-30 of this chapter.